HARVARD
LAW REVIEW

VOL. XXXI NOVEMBER, 1917 NO. 1

THE LAW AND THE STATE

INTRODUCTION

THIS paper was completely prepared, if not completely written, long before the outbreak of the present war, which for the past three years has brought desolation and destruction upon the earth. It is not, therefore, a paper adapted to circumstances; nor can it be said to have been written to bias judgment, or with any such idea in mind. It will, then, it is hoped, have only greater weight in showing that German doctrines of public law in the nineteenth century from Kant to Jhering and Jellinek were, for the most part, mere apologies for the use of force; and that under the cover of juridical theories they had only for their object the reëstablishment of absolutism of the State, and especially of the prince who represents it at home and abroad: while, on the contrary, the persistent effort of French juridical doctrine has ever been, from 1789 to the present time, to find the true juristic basis for legal limitation upon the power of the State, and to insure its sanction. Its conceptions have been diverse. They have varied from the purest individualism to the completest socialism. But the end in view has always been the same; namely, to prove that the powers of the State are limited by a jural principle (*une règle de droit*) superior to the State itself.

It would be incorrect and unjust, however, not to recognize that certain great German jurists, notably Gerber and Gierke, have affirmed the same principle and have tried to prove it. But they have remained isolated; and their appeals have never received recognition.

I

Does there exist a jural principle (*une règle de droit*) superior to the State, which forbids it from doing certain things and commands it to do certain others? Such is the fundamental question of public law. If the answer is no, then there is no public law, since no act or refusal to act on the part of the State will be contrary to law. The question is not to determine whether one department or another of the State may or may not be under obligation to do or refrain from doing certain things; it is to learn whether there are obligations of a legal kind, positive or negative, which bind the State, considered by itself, delimiting the power of its several departments, with the result of imposing duties of action or inaction upon its several departments, legislative as well as executive.

It is moreover necessary to understand thoroughly the meaning and scope of the question. It is not an economic question. It is not a moral question. It is solely and exclusively a question of law. And for that reason, in the recital of the various doctrines, which is to be the object of this paper, only theories of law, properly so called, will be discussed. No discussion of any question involving the theories taught by such historians as Treitschke or by generals like Bernhardi will be attempted, inasmuch as their abominable theories have for the past two years been time and again exposed in books, reviews, and periodicals. They and their likes have never had the desire to expound a juridical theory, but simply to formulate a principle of political and military action, which is wholly contained in the oft-repeated principle of Treitschke: "Der Staat ist Macht."[1] The events of the last three years have proved that their influence has been great in Germany. Although they have attracted less attention, the influence of theories of law, properly so called, has not been less.

Politically and economically, the question of the limitation of the powers of the State is certainly a problem of capital. The question is one of determining to what extent the State is to interfere, with the powerful means of action at her disposal, to assure the economic,

[1] Treitschke, Politik, Vorlesungen gehalten an der Universität zu Berlin, Leipzig, 1899–1900. Among the numerous works which have been written upon Treitschke's political theory, the citations will be limited to the paper of M. Durkheim: L'Allemagne au dessus de tout, la mentalité allemande et la guerre de 1915; and a book written by M. Posada, entitled Tratado de derecho politico, Introduction, p. 27.

intellectual, and moral development of the people. It is not only a question which, in a practical way, confronts each and every individual of the State, but which has caused and will continue to cause theoretical controversies without end. It is one which devolves upon economists and politicians for solution, not according to a superior principle *a priori*, but according to the circumstances — according to the material and moral needs of each country.

On the other hand, we can and must ask ourselves if there exist moral duties which are imposed on men holding political power, if there exists a moral law (*une règle morale*) which limits their actions and constrains them to perform certain obligations. That these moral duties exist there can be no doubt; and all in all it has never been contested, even by the most pronounced absolutists, whatever principle be given as the basis of such moral law (*règle morale*). The notion of such a rule implies that a free will must wish certain things because they are good in themselves and refrain from wishing certain others because they are evil in themselves. It implies, in a word, the distinction between right and wrong in itself, whatever be given as the criterion of this distinction. It is then evident that no one would think that the men who hold political power are not obliged, in exercising that power, to conform to a certain rule, according to which they must do certain things and abstain from doing certain others. By what criterion shall such duties be determined? Diverse and innumerable answers can be and have been given to the question. Systems of political ethics, like systems of individual ethics, are innumerable. But in reality there is no mind which does not admit of some sort of moral code, and consequently there are none who deny the existence of a certain rule of moral conduct binding upon those who govern.

II

The problem of limitations upon the State, as stated, is purely juridical in its nature. It resolves itself into the determination of the question whether there is a jural principle (*une règle de droit*) which is imposed juridically upon the State, which controls its action, creates obligations for it, and delimits its power. This jural principle (*une règle de droit*) may be clearly distinguished from the moral rule (*la règle morale*) by its principle, by its consequences, and by its sanction.

The jural principle (*la règle de droit*) forbids or commands a certain thing be done, not because taken in itself such act is good or bad according to some principle conceived *a priori*, but because it is contrary to or in agreement with social relations in a fixed human collectivity. The moral law considers man in the fulness of his being, both with respect to his mental states and his outward conduct. The jural principle (*la règle de droit*) looks only to the outward manifestations of the human will. It applies only to wills entering into relation with other wills. This is true whatever be the basis of the jural principle (*la règle de droit*). Little does it matter whether the autonomy and inviolability of the individual be granted, and whether the obligation to respect them be affirmed as binding on every human will, or that the jural principle (*la règle de droit*) be admitted in itself as being the social discipline, the organic rule of all social grouping. Its concept always implies the idea of a principle applying to all men living in society and because they live in society.

On the other hand there is no jural principle (*une règle de droit*), except when the very idea of this principle, when the notion of the social necessity for it, which requires conformity to it, has so deeply penetrated the conscience of those composing the social group in question that its violation of this principle entails such a profound group reaction that the principle can be socially organized. A rule which is at first simply a moral rule can become in time a rule of law, and the change is accomplished when the social reaction produced by the violation of this rule has become energetic enough and definite enough to receive from custom or from the written law a concreteness more or less complete. Moral law has not, in truth, any earthly sanction. For believers, it has merely a sanction patterned after human sanction. But that is extra-scientific. The principle of morals (*la règle morale*) can have remorse for sanction; but that is wholly individual and is in no case a social sanction. Sometimes attacks on the moral law (*la morale*) provoke disesteem for the person who is the author of them. But this sanction remains, as it were, in a diffused state and is not capable of being socially organized.

On the other hand, the moral rule (*la règle morale*) imposes certain obligations, not because of the relations existing between individuals, but because of the very character of the thing which it commands.

If a rule of morals implies a duty imposing itself on a certain will it does not imply a corresponding power resulting from it in some other will. But it is different with respect to the jural principle (*la règle de droit*) precisely because it has its origin in social intercourse, because it has for its object the regulation of the existing relations between the wills of the individuals composing a certain social group. Every jural principle (*toute règle de droit*) implies an obligation upon a certain will to will certain things; but it implies at the same time in some other will the power of willing some other thing. I wrote in 1901: "A duty of willing binds every individual will; an individual will, whatever it be, must not will a thing which would be contrary to the jural principle (*la règle de droit*), must not form a volition which would be determined by a motive not recognized by this principle. Inversely, every individual will has the power to invoke the principle, to produce an effective result thereby when such individual wills in accordance with the principle, and the effective result is binding socially on all individuals. In social groups where there is a conscious and organized force, that is, a political power in states, this result is binding on the holder of power, who will have to use the power which he wields to obtain the desired result." [2]

III

We can now see clearly how the question presents itself. Is the State subject to a jural principle (*une règle de droit*)? It is not a question of determining whether or not any one of its departments is bound by law, but of ascertaining whether the State itself, whatever be the department that intervene, is limited in its action by a jural principle (*une règle de droit*) to which it is subjected, — that is, by a principle which subjects it both to positive and to negative obligations, and having a sanction capable of being socially organized. Is the State submitted to such a principle, that is to say, a principle which not only imposes on it duties socially sanctioned, but also implies at the same time in all wills the corresponding power of intervention to assure the application of this principle, the accomplishment by the State of the obligations which it imposes upon it?

One can easily understand the magnitude and importance of

[2] L'État, le droit objectif et la loi positive. Paris, 1901, Vol. I, pp. 143 and 144.

the problem. It is a question even going to the very basis of public law. If the State is not subject to such jural principle (*une règle de droit*), there is no longer any public municipal law (*droit public interne*) nor any international law (*droit public international*). There is no longer any limit to the material power of the State, to the *Macht* as the Germans call it. The State is *Macht* and nothing more. Individuals become the property of the State and small nations the predestined slaves of a powerful state.

I want to affirm at this point that, whatever the difficulties of the problem may be, we are under bounden duty to solve them. We must establish in a positive way the principle governing limitation of the State in accordance with right (*par le droit*). There is no social and international life possible without such a principle. Without it there can only be violence and barbarism.

What, then, are the difficulties of the problem? They are weighty, and vary according to the notion of the State that one forms. The innumerable doctrines which have been proposed concerning the origin and nature of the State grow out of two different general tendencies, and can be classed under two general categories, namely, the metaphysical and the realistic doctrines. The problem of legal limitation upon the powers of the State takes on aspects altogether different according to whether one thinks in terms of the metaphysical conception or in terms of the realistic conception of the State.

IV

I classify as metaphysical all doctrines which think of the State as a being gifted with a personality distinct from that of individuals who form the social grouping — the basic element of the State — as a personal being possessing a will which is by nature superior to individual wills, having no other will superior to it. This will receives ordinarily the name of sovereignty.

These are certainly doctrines of a metaphysical nature. For even though we can only prove directly the existence of persons and of individual wills, they affirm that there exists apart from individuals a being at the same time one and collective, gifted with a personality springing from conscience and will, and they even pretend to determine the very essence of this will and declare it by nature superior to individual wills.

Certain adherents of these doctrines have, moreover, attempted

to explain and to prove the actual personality of the State and the character of superior sovereignty belonging to its will. They are, to be truthful, the French representatives of the metaphysical conception of the State. The German publicists have not attempted this. Under the influence of the doctrines of the Hegelians, they have supposed the personality and the sovereign will of the State as existing *in itself* and *for itself*. They have seen in the State the synthesis of the particular and of the collective, and in this the realization of the moral idea. Without making further inquiry, they have proclaimed the conscious, willing, and sovereign personality of the State.

At any rate, these diversities which are, all in all, secondary, do not matter, at least so far as the solution of the question to be considered is concerned. The problem of the subordination of the State to law (*le droit*), so far as the metaphysical conception is concerned, is always the same. It is this: If the State is by nature a sovereign will, that is to say, a will which commands individuals and is not subordinated to any other will, how can it be in subjection to a rule binding upon it, since by definition there is no other will capable of imposing a rule upon it? If there was a superior jural principle (*une règle de droit supérieure*), imposing itself upon the State, the latter would cease to be sovereign and consequently would cease to be the State. There is absolute contradiction between the notion of the sovereign State and the notion of a jural principle (*une règle de droit*) superior to the State and limiting its action.

The German jurists have expressed this idea in the following formula: The State by definition possesses a will that never delimits itself except by itself, that determines the sphere of its own action, that has "jurisdiction of its own jurisdiction" (*la compétence de sa compétence*). The State would cease to be the self-determining sovereign will, it would cease to have the control of its own limitations (*la compétence de sa compétence*), it would cease to be the State, if its will were bound by a superior principle (*une règle supérieure*) fixing and limiting the extent of its action.

The problem is grave. To express my honest conviction it is in reality insoluble. In spite of the efforts that have been made, in spite of the miracles of subtlety which have been displayed, no satisfactory solution has ever been given. None will ever be given. The most ingenious systems have only veiled the difficulty. They

have never solved it. They arrive always at the same conclusion — the omnipotence of the State or the negation of its sovereignty — and they vacillate between the absolutism of a Jean Jacques Rousseau and of a Hegel, and the anarchism of a Stirner. This will be shown in the exposition which will follow.

V

In the realistic conception the State is not a person distinct from individuals. If the will of the State is spoken of it is simply by way of metaphor and for convenience of expression. It is said that there is a State in human society when an individual or group of individuals have succeeded in monopolizing the power of constraint in that society and within definite boundaries; or in other words, when there is in a given society a permanent differentiation between those governing and those governed. The realistic conception discards all affirmations of a metaphysical nature. We can only testify to manifestations of individual wills. We can only speak, then, of individual wills. The existence of the single collective will of the State distinct from individual wills is a metaphysical hypothesis without any scientific value. There is no will of the State; there are only individual wills of those governing. When they act they are not the mandataries or the subordinate parts of a supposed collective person, or an assumed personality, the State, whose will they express and execute. They express and carry out their own wills; there is no other. Any other conception of the State is fantastic.

One can easily see that, taking the latter conception of the State, the problem of legal limitation upon public power assumes a different character than under the metaphysical conception. The difficulty, resulting from the supposed sovereignty of the State, although it cannot be solved, is no longer present, since this sovereignty is the will, which is superior in the nature of things to the collective person, the State, and the realistic conception by a denial of the existence of such a collective personality, denies also the existence of the sovereignty itself. The wills of those in power, being purely and simply individual wills, can, like all other individual wills, be subordinated to an imperative principle of right and law superior to themselves, the basis of which still remains to be determined. But, for the time being, let us disregard that question.

The difficulty of the problem in the realistic conception, and also for that matter in the metaphysical conception, consists especially in finding a means of sanctioning the legal obligations resting upon those who govern. It is said we can conceive of those who govern as being obliged to conform to a moral precept, to certain laws of an economic nature; but we do not think of them as being bound by a jural principle (*une règle de droit*). The latter, as we have said before, may be distinguished from the moral law in that violations of the juridical norm (*la norme juridique*) cause a social reaction of such moment that it can be socially organized. Then if by definition those who govern monopolize the force of constraint, we cannot conceive that they can organize against themselves the sanction of the jural principle. One must, therefore, come to the conclusion that there is no such jural principle binding upon those who govern, because no organized social sanction against them is possible, and that, whenever there is no possibility of organizing a social sanction, there can be no jural principle.

Here should be especially noted what M. Esmein writes in the course of a vigorous attack on all realistic doctrines: "The negation of the right of sovereignty, in my estimation, has only one very clear result, namely, to affirm the reign of force, the right of force alone to create governments, that right of force which the ancient régime had already repudiated, and which is condemned more clearly by the principle of national sovereignty. It is a question of fact instead of one of right (*du droit*)." [3]

Whatever be the authority of the learned and ever-lamented professor, I believe, on the contrary, that if any doctrine can establish on a sound basis juridical limitation of the powers of the State, it is a doctrine purely realistic in its nature. All the metaphysical doctrines have been confronted with the following unsolvable dilemma: either the State is sovereign (in which case, being limited only by its own will, it cannot be submitted to an imperative rule) or else it is subject to an imperative rule (in which case it ceases to be sovereign).

After an exposition of the French and German doctrines, which I shall attempt to set forth as correctly and as impartially as possible, I shall allow the reader to draw his own conclusions.

[3] Esmein, Droit constitutionnel, sixth edition, by Joseph Barthélemy, 1914, p. 43.

CHAPTER I

THE INDIVIDUALISTIC METAPHYSICAL DOCTRINE. — THE DECLARATION OF RIGHTS OF 1789

THIS doctrine is made up of two essential elements. The State is the organized nation; the nation is a person; it possesses according to Jean Jacques Rousseau, *a common ego* (*un moi commun*), a conscience, a will. It is the general will, the national will; and this will is sovereign, because it is the general will. The State is sovereign because it is the nation organized, and it is accordingly endowed with this general sovereign will. But at the same time the individual is endowed with natural rights that belong to him because he is a man, which rights the sovereign will of the State cannot infringe, or at least can only infringe within certain limits and under certain conditions. Natural individual rights come in this way to limit the power of the State.

This doctrine, the most complete and concise expression of which may be found in the Declaration of the Rights of Man and of the Citizen of 1789, is built in solid logical fashion. If we admit the premise, all the conclusions that are drawn from it follow logically. But the premise may well be contested. The foundations of the doctrine are singularly fragile; and the guarantees that it pretends to give the individual against the arbitrary acts of the State appear very precarious.

I

The individualistic doctrine is of very ancient origin. It can be found in embryo in the writings of the Roman jurisconsults, and all the law of Rome in the classical period is unquestionably an admirable individualistic construction. The idea was taken up again and developed in the sixteenth century. It was the inspiration for every idea of great moment during this period and particularly with respect to the writings of the Monarchomachs. It finds almost complete and final expression at the end of the seventeenth century in Locke's *Treatise on Civil Government.* It is the idea that took the lead as the inspiration for most of the political

writers of France in the eighteenth century. Finally, it was perpetuated in terms of rigorous precision and admirable conciseness in the Declaration of the Rights of Man and of the Citizen of 1789, and in the first title of the Constitution of 1791 called *Fundamental Provisions Guaranteed by the Constitution.*

The individualistic doctrine premises man as an individual. It affirms that man is born vested with rights that belong to him because he is man; natural rights that cannot be taken away from him because, if man were deprived of them, he would cease to be man. These rights inseparable from human nature are thus inalienable and indefeasible. They are essential attributes of human nature. He is endowed with these rights because of the nature of his personality. They are, therefore, natural powers of the human will. "The principle," writes M. Henry Michel, "rests on faith in the absolute value, in the inimitable originality, of the human will. . . . The idea of the sublime dignity of the human person is what the eighteenth century has bequeathed to us." [1]

The human personality has, then, an intangible power standing out against everyone, individuals as well as collectivities, so far as the exercise and development without hindrance of its physical, intellectual, and moral activity is concerned. Man is free or, expressing it more definitely and comprehensively, has an autonomous personality, an independent will. The autonomy of the human person is the fundamental affirmation of the doctrine, and in it can be found the basis of its whole development.

All men at birth have the same autonomy and accordingly they have the same rights. They can, however, be different physically, intellectually, and morally. In rights (*en droit*) they are absolutely equal. They have the same autonomy, the same independent will, the same power of freely developing as against every other person their physical, intellectual, and moral activity.

II

To individuals equally autonomous — or what is the same thing, free and equal — the idea of the State as a sovereign personality is repugnant, whatever be, for that matter, the manner in which we explain the birth and development of this sovereign personality.

[1] Henry Michel, L'idée de L'État, 1896, pp. 60 and 644.

In 1789 in France and in America the conception of the sovereign State was generally explained by the hypothesis of the social contract, of the primitive pact, by which men voluntarily relinquished a part of their natural independence for the purpose of acquiring security in return, resulting in the formation of a collective ego (*un moi commun*) — a will at the same time one and collective, the sovereign will of the State.

This, however, is of little importance. The State exists; it is sovereign. Its purpose is the conservation of the natural and indefeasible rights of the human individual. In article two of the Declaration of Rights of 1789 we read: "The end of all political association is the conservation of the natural and indefeasible rights of man." In a draft of the constitution prepared in 1793 by the Girondist party we may find the following also: "The end of all union of men in society is the maintenance of their natural rights, civil and political, these rights being the basis of a social compact." And in the first article of the Declaration of Rights of 1793 is this: "The end of society is the common welfare. The government is founded for the purpose of guaranteeing man the enjoyment of his natural and indefeasible rights."

The autonomy of the individual, therefore, is anterior and superior to the State, which exists for no other reason than to protect and to secure this autonomy. This then is the theory of limitation upon the power of the State. The character of the limitation is truly juridical, since we maintain the existence of subjective rights belonging to the individual. It is these subjective rights of the individual which limit the action of the State.

The State is legally obliged not to do anything which would interfere with the autonomy of the individual, that is to say, with the free development of his activity. The State is obliged to do all that is necessary to guarantee, to protect this free development, and to remove all interferences which might hinder it.

At the same time, the State has the power and duty of bringing into play certain limitations with respect to the exercise of the rights of each individual, but only to the extent of such necessity in saving and assuring to all the free exercise of their rights. It can limit the activity of each to protect the freedom of all. For the same reason the State has the power and the duty to repress and to punish all infringements of individuals upon the autonomy of

others. It has the power and duty of deciding all conflicts of rights that arise between two or several of its citizens. The State can even create certain restrictions upon the rights of the individual by preventive measures to which it can give a penal sanction. It establishes, therefore, a system of police. But it can only act in this way when it is clear that the system of repressive law would certainly be powerless to protect the security of the individual.

When the State goes beyond the limit of its power so determined, it violates the juridical law which is superimposed upon it — a juridical law which is founded upon the recognition of subjective rights belonging to the individual. In the same way the State again violates the law to which it is submitted if it establishes different restrictions for different individuals or classes, because then it interferes with the fundamental law of natural equality of men. The State again violates the law to which it is subjected if it neglects to assure to each individual the guaranty of his rights, to decide all conflicts of right, and to assure even by force, if necessary, the execution of the decree.

III

Do the positive duties of the State go further? Should the individualistic conception, to be logical with itself, recognize the legal obligation of the State to accomplish, for the profit of the individual, certain positive services?

The question has especially been asked with respect to that which has been called the right to assistance, the right to employment, the right to have instruction. Is the State obliged to furnish the means of subsistence to every individual who is absolutely unable, for any reason whatsoever, to procure such subsistence through employment; to assure to every individual who wishes and can so work, work sufficiently remunerative; to furnish gratuitously to the sick, who are without means, medical aid; and finally to secure to each individual the means of acquiring gratuitously a minimum of instruction?

Unquestionably it was admitted in 1789 that the individualistic conception neither conceded the right to employment, the right to assistance, nor the right to instruction. It seems, nevertheless, that this triple right was affirmed by the Duke of Larochefoucauld-

Liancourt in his report read before the National Assembly, May 30, 1790, and was followed by the drawing up of a decree adopted the same day. The following is stated therein: "Society owes to all its members subsistence or work." But this double right finds its counterpart in the obligation to remain employed, which is binding on all healthy individuals. "Whoever can and refuses to work is guilty of an act against society." The law, which was enacted by the Assembly did not sanction expressly the right to assistance nor the right to have employment. Nevertheless, the enactment creates workshops, providing for "either cultivation of the land for men or manufacturing for women and children"; and it says further, "in substituting for the humiliating word 'alms' the more appropriate word 'help,' we must ennoble in this way both the nation that gives and the poor that it assists."

In the Declaration of Rights of 1789 there is not a word which alludes in any way whatsoever to recognition of the right to employment, to assistance, and to instruction. In the Constitution of 1791 we find a simple enunciative disposition stated as follows: "There will be created and organized a general bureau of public aid for the purpose of rearing abandoned children, for aiding poor cripples, and furnishing work to poor people who are able to work but cannot procure employment. There will be created and organized a system of public instruction, accessible to all citizens and free, with respect to such elements of education as are indispensable to all men. . . ." (Title I, paragraphs 7 and 8.)

The Convention, contrary to the National Assembly of 1791, seems to have recognized at a certain time such rights of employment, assistance, and instruction. In fact we may read the following in articles twenty-one and twenty-two of the Declaration of Rights of 1793: "Public aid is a sacred debt. Society owes subsistence to unfortunate citizens, even in procuring them work, or in assuring means to those who are unable to work. Every one needs education. Society must favor as much as possible the progress of the public mind, and place instruction within the reach of all its citizens."

These texts appear very formal. But drawn up under the influence of Robespierre, they certainly did not express the true thought of the majority of the Convention. One must look for it, not in the Constitution of 1793 — an act adapted to circumstances

and not applied — but in the Declaration and the Constitution of the Year III, which is, as it were, the political testament of the great assembly. We do not find there a single word referring to a right of employment, of assistance, or of instruction. Articles 196 to 300 have reference solely to the general principles on which the organization of public instruction will rest.

By the decree of February 5, 1848, the Provisional Government bound itself "to guarantee the existence of the worker through employment . . ., to guarantee work for all its citizens." The Constitutional Commission that had inscribed the right of employment in its first draft suppressed it in the final one; and the Assembly, after a long discussion, rejected the amendment of Mathieu de la Drôme, which contained this: "The Republic . . . recognizes the right of all citizens to instruction, to work, and to assistance" (meeting of September 4, 1848). It was content to pass a very vague but short formula, which certainly did not sanction these different rights. (Constitution of 1848, Preamble, article 8.)

Today M. Henry Michel and all the neo-individualists who derive their inspiration from his great work teach that the State is not only obliged not to interfere in any way with the autonomy of the individual and to protect the rights of the individual by its law, by its police, by the decisions of its tribunals, but it is under obligation to perform for individuals positive services in the form of furnishing work, assistance, and instruction under the conditions which have been previously indicated.

"Justice," writes M. Henry Michel, "lies in the will and the effort to assure to moral persons the effective enjoyment of rights which have previously been recognized for them; and it is possible to reduce these to two, namely, the right to live and the right to develop oneself through culture. A just citizen would be one who wishes to manage social and political institutions in such a way that this double right would be recognized in principle — assured in fact — to his fellow citizens. A just city is one which, composed of just citizens, is organized spontaneously, cheerfully, in such a way as to realize its ideals — all for the purpose of guaranteeing them — and assigns to the State an economic and moral function." [2]

[2] Henry Michel, L'idée de L'État, 1896, p. 646.

IV

The individualistic doctrine is completed by a theory of organization, which is necessary to give sanction to the legal obligations binding on the State. It asserts that the individual has the right to exact from the State, not only that it shall not interfere with the autonomy of the individual, not only that it fulfill all its obligations, but that it shall so organize itself as to guarantee, as far as possible, the accomplishment of the duties which are imposed upon it. That is the right which the constitutions and the declarations of the revolutionary epoch call "security," and is one of the rights of the citizen gradually becoming superposed upon the rights of man.

The State fulfills its obligation in this respect by establishing its political organization on the principle of the *separation of powers*, that is to say, in dividing its sovereignty, one and indivisible, into three parts, equally sovereign, incarnating each in a separate body, thus forming the legislative, executive, and judicial power. So we have the mystery of the political trinity, which leaves the sovereignty in its essence, one and indivisible, even though divided into three elements — into three distinct persons, equally sovereign.

The legislative power becomes incarnate either in the assembly of the people or in the assembly of their representatives. It is especially through the legislative power that the sovereignty of the state manifests itself. It is this power which enacts provisions, which become rules of positive law, binding on everyone, not only on individuals, but also on the different powers of the State — on the judicial, executive, and on legislative power itself. It can modify or abrogate the law, but so long as the law exists it is bound by it.

The legislative power, on the other hand, can make no law contrary to the obligations of the State, such as have been determined above. It can make no law which will interfere with any right whatsoever of the individual, whether these obligations of the State and those rights of the individual have been expressly recognized and sanctioned, as in France and in the United States by the constitutions and written laws, or whether they have been, as in England, recognized and sanctioned by custom — spontaneous manifestation of the collective conscience.

The Constitution of 1791 has clearly set forth this limitation

upon the legislative power in terms which must be quoted: "The legislative power cannot make any laws which shall infringe and interfere with the exercise of the natural and civil rights recorded in the present title of and guaranteed by the Constitution." (Constitution, 1791, title I, paragraph 3.)

Every law is presumably in harmony with this rule and intended to protect the rights of the individual, to reconcile them with the needs of the community. That is why every law is obligatory and is to be respected by all. That is also why every law binds the State itself. Here we reach the central point of the doctrine. The State is not only bound by the superior principle of the individual juridical autonomy, it is also bound by positive laws which it enacts itself, since these laws presumably are based upon individual rights and have for their object the protection of individuals. If the State disregards them, it would *ipso facto* be infringing on the rights of the individual. Thus, the individualistic doctrine, at least if we admit its point of departure, results in a very logical and very satisfactory solution of the problem how to explain the assertion that the State is bound by positive laws which it enacts itself.

Parliament, the holder of the legislative power, cannot make a single provision in violation of the law so long as the law exists. The executive power must conform to law, and the judicial power can only judge in conformance with the law. But what must and what can the judicial power do, if we assume that the law spoken of previously is contrary to the superior principle (*la règle supérieure*), written or not written, which in the individualistic conception is binding on the State? This question has been answered differently in France and in the United States, starting, however, from this very individualistic conception and from this same notion of separation of powers.

Thus, it is said in the United States: The legislative power ought to apply the law; but it cannot be obliged to apply a law which it believes to be contrary to the superior law (*le droit supérieur*) binding on the legislator himself. Consequently, all tribunals (*toute jurisdiction*) have the power and the duty of deciding whether or not the law in issue before it is in harmony with such superior principle. As this principle is usually set forth in a written constitution, they say: All tribunals have the right to pass on the constitutionality of a law and not to apply it if it is believed to be

unconstitutional. In France, on the contrary, till recent years, we have taught as a kind of dogma that the judiciary is not competent to pass on the constitutionality of laws, and must apply every law regularly voted and promulgated even when it seems to it unconstitutional; or in other words, that no question of unconstitutionality can be considered. The French tribunals have many times so decided.

The American solution is certainly much more in harmony with the principles of the individualistic doctrine than the French solution. The tribunals have, it is true, for their first duty the application of the law; but they must apply the constitutional provisions as well as the ordinary laws. Then if a conflict exists between an ordinary law and a constitutional provision, the tribunals are necessarily and logically obliged to apply the superior law, that is to say, the constitutional provision. On the other hand, the American solution creates in a singular manner a positive sanction for enforcement of the obligation resting upon the legislative, namely, to respect the superior principles of right (*le droit supérieur*) imposed upon it. It is interesting to note that in reality the French doctrine very clearly works out in the sense of the American solution.[3]

The executive and the judicial power are not supposed to do anything contrary to law; and, therefore, the State must create machinery for annulling any administrative or judicial act done in violation of the law; and it must recognize and sanction the personal responsibility of the agents guilty of having so violated it.

But all that, nevertheless, can be of no avail in guaranteeing the individual against the infringement of his rights. Need the principle be carried out to its logical conclusion? Must we go so far as to say that, if the State infringes upon individual rights, the individual can legitimately resist this usurpation of power by force? Is it necessary to recognize as a right of the individual what has for centuries been called resistance to oppression?

Theorists believing in individualism have not hesitated in going that far. They have affirmed as a logical consequence of the principle that the individual has the right not only to refuse to execute an authoritative order contrary to law, but even to oppose by material force the command of such authority when it interferes

[3] Berthélemy and Jéze, Revue du droit public, 1912, pp. 365 *et seq.*

with such rights, and even to overthrow the government by force as a violator of right. According to the terminology of theologians, the theorists of the individualistic type have admitted, as legitimate, resistance to oppression, passive resistance, defensive resistance, and even aggressive resistance.

Without going further back than the seventeenth century, we can find, in Locke, the right of resistance to oppression frankly affirmed. He thus writes: "When legislators try to steal and to destroy the things which belong by right to the people or to reduce them to slavery under an arbitrary power, they place themselves in a state of war with the people. . . . It devolves, then, upon the people that have such right to regain their original liberty . . . to provide for its conservation and security." [4]

The French Declaration of Rights sanctions especially the right of resistance to oppression. The Declaration of 1789 places resistance to oppression among the natural and indefeasible rights of man on the same footing with liberty, property, and security. But it is not confined even to these statements of it. (Article 2.) In the Declaration of 1793 there is a doctrinal explanation of resistance to oppression. Articles thirty-three to thirty-five are worth quoting at length: "Resistance to oppression is the consequence of the other rights of man. There is oppression with respect to the social body when a single one of its members is oppressed; there is oppression against each member when the social body is oppressed. When the government violates the rights of the people, insurrection is, for the people and for each portion of the people, the most sacred of rights and the most indispensable of duties."

The Convention approved even of the murder of one who had usurped power without right by violence or by trickery — of one whom the ancient theologians called a tyrant *ab initio* (*tyran d'origine*). "Let every individual that would usurp sovereignty be put to death immediately by the free men." (Declaration of Rights, 1793, article 27.)

Thus insurrection against the tyrant by practice (*le tyran d'exercice*), against the government whose power has a legitimate origin but which is being used in an oppressive manner, and against the tyrant *ab initio*, the usurper, are the ultimate and logical

[4] Locke, Traité du gouvernement civil, French edition, Amsterdam, 1691, pp. 269 and 285.

consequences of the individualistic doctrine in the domain of politics.

V

In the domain of private right the individualistic doctrine has also constructed a strongly organized system which serves as a model for all civil codes of modern countries. The propositions of which it is comprised are logically deduced from the principle.

The State cannot infringe upon the free development and activity of the individual. Consequently it must respect and guarantee the results of this activity. The foundation of ownership may be stated in two words: individual right, natural and indefeasible, and liberty, inasmuch as there is at bottom only liberty in so far as it acts, works, and produces. All declarations of rights of the revolutionary epoch place ownership beside liberty among the natural individual rights.

On the other hand, the autonomy of the individual implies the power in him of diminishing or extending his sphere of legal activity by an act of his own will, through performing what is called a juristic act, creating determinate relations with another individual. But these legal relations between two subjects of rights imply that the one wills to increase his sphere of juristic action, and that the other wills to diminish it. Consequently, they imply an agreement of wills, which is contract. Two consequences result from it. First, a relation of right between two individuals can exist in principle only by contract and every juristic act is normally a contract. Second, the State is obliged to guarantee the contract binding two individuals, and to assure its execution, if need be, by material constraint. This obligation is the direct consequence of the obligation resting on the State to protect the autonomy of the individual.

The State is obliged also to respect and to execute the contracts to which it is party. One could say, as has in fact been said: The State is not bound by the contracts it makes because its will being sovereign it cannot be bound by the will of the other contracting party. Not at all, answer the advocates of the individualistic doctrine. The State is bound by the contracts which it makes because these contracts can arise only by means of an act of the autonomous will of those who contract with the State. The latter is obliged not only to respect this autonomous will but also, for that reason, the contract which it has willed.

Finally, the State must make reparation for all damage which it causes to an individual when it exceeds the limits of its legitimate activity, and it must compel every individual to repair whatever harm is caused to another when acting without right.

And so we find three general propositions, derived logically from individualistic principles, which alone constitute the whole basis of law as to interest of substance in the Code Napoléon: Inviolability of the right of ownership; obligatory force of contracts; reparation for all injuries caused unlawfully. Articles 544, 1134, and 1382 of the Code Napoléon, which sanction these rules, are only the application in the domain of private right of the principles of the Declaration of Rights. I have tried to show elsewhere how this purely individualistic and wholly metaphysical conception of the Code Napoléon disappeared progressively and how our civil law evolved toward a realistic and social system.[5]

VI

The individualistic doctrine — thanks to the richness of its principle — could also give us a solution of one of the most difficult problems of the modern world, which will confront us with a singular intensity when the turmoil now upsetting the whole civilized world shall have come to an end. The problem of international law is found wholly in the contradiction between the notion of sovereignty and that of legal limitation of the will. If the State possesses a sovereign will, that is to say, is its own mistress, and determines itself only by itself, it cannot be bound by a superior rule — by obligations toward another State — because it would then cease to be sovereign. One could then say that there cannot exist between two or more sovereign states any relation of right, any reciprocal obligation of a legal character; that violence and force are the only laws of international relations.

We know with what impudence this proposition was affirmed at the very beginning of the war by the representatives of Germany. We shall see, moreover, that with more discretion the greatest jurisconsults of Germany have said in reality exactly the same thing.

In bringing into international relations the principle of the

[5] I beg to refer the reader to my book, Les transformations du droit privé, 1912.

autonomy of the will, the individualistic doctrine has been able to give a satisfactory solution to the problem. Every State is an organized nation; every nation is composed of individuals, all gifted with an autonomous will; and it is the coördination and the fusion of these autonomous wills that forms the national will. The latter is autonomous like the individual wills which are its constituent parts. All nations of whatever size are equally autonomous, that is to say, have equal rights to independence and to the free development of their activity. States, which are only organized nations, being therefore free and equal, like individuals, are obliged to respect this equality of all, both as to independence and autonomy.

Since then, just as in the society of individuals there arise obligations which limit the liberty of each to the extent necessary to protect the liberty of all, so in the society of States there exist jural principles which impose certain restrictions upon the independence of each in order that the autonomy of each will be respected and protected. Several of our constitutions have very clearly formulated these principles. Under the sixth title of the Constitution of 1791 we read: "The French nation refuses to undertake any war for the purpose of making conquests, and will never employ its forces in restraint of the liberty of any people." The same idea is expressed in the Constitution of 1793: "The French nation is the friend and the natural ally of free peoples. It does not meddle with the government of other nations; it will not tolerate intermeddling by other nations with its own. It gives asylum to strangers banished from their country for the cause of liberty. It refuses such refuge to tyrants. It will not make peace with an enemy which is occupying its territory." The world knows that with respect to these matters France of 1917 is of the same faith as the France of 1793.

The constitutional law maker of 1848 wrote thus: "The French Republic respects foreign nationalities as it means to have hers respected; it undertakes no war for purposes of conquest and never uses its forces in restraint of the freedom of any people." (Preamble to the Constitution of 1848, paragraph 5.)

An exposition of the French doctrine as to the foundation of international law is not attempted in this paper. It will suffice to recall that its most eminent representatives agree to place at the very foundation of international law what they call fundamental

rights of States, the aggregate whereof make up their independence and their autonomy. [6]

VII

I do not intend to enumerate all the difficulties which are raised by the individualistic doctrine, but only to indicate a few of the more important reasons that make it theoretically inadmissible, and to all intents and purposes will sooner or later completely overthrow it. It is really admirably constructed. The principle behind it once admitted, all the consequences follow in perfect logical order. This in itself is pleasing to the mind. But such principle has not been and cannot be proved. It contains an insoluble contradiction in itself, and as soon as it is impeached its whole structure breaks down.

The affirmation that man because he is man, taken isolated and by himself, separated from other men, in the state of nature, as they said in the eighteenth century, is endowed with certain rights, peculiar to his nature as man, — this affirmation is purely gratuitous; it cannot be supported by any direct proof. It is a purely metaphysical proposition with respect to the nature or, as the schoolmen used to say, the essence, of the human being. This affirmation might suffice in a period of metaphysical belief; but it is a purely verbal expression — nothing more — in a positivist and scientific epoch like ours. It can satisfy a believer, but it is void of all scientific and positive value.

The statement with respect to the natural man, isolated, free and independent, is not only an affirmation of a metaphysical nature, but, moreover, is contradicted by the ascertained facts as to the physical nature of man, which can be the object of direct observation by scientific methods. Today all biological and anthropological sciences prove that man, given his physical organs and his physiological constitution, cannot live alone, has never lived alone, can live only in society, and has never lived except in society. The whole progress of the natural sciences establishes the fact in a more and more conclusive way. One cannot consider the natural man independent and isolated; one can think of man only as a social being or rather one can conceive only of society. Man does

[6] *Cf.* Pillet, Les droits fondamentaux des États, Revue du droit internationale public, V, 1898, and VI, 1899.

not exist anterior to society; he exists only in society and through society. It is not true to say that there have been, nor even that there can be, men naturally free, isolated and independent, whose coming together has formed societies. There have been societies of men since the beginning of the existence of man. To think of man isolated is to think a thing which does not exist, and which the facts prove never to have existed. Therefore the idea of the social man is the only possible starting point of juridical doctrine.

Moreover, the principle of the individualistic doctrine contradicts itself. They say that natural man, taken as such, apart from his dealings with other men, is born with rights which he brings with him in entering society, and that it is these natural rights which he can assert against society and the State, which is but society organized. Then let the innumerable dissertations which have been written on the nature of subjective right be what they may, let the proposed theories vary as they will in detail, all writers in the long run agree to recognize that subjective right essentially can be only this: the power of a will, manifesting itself by outward action, to impose certain objects of its will upon the respect of other wills. Subjective right implies three elements: A subject with a will, who expresses his will; something desired by the subject; and a person upon whom the subject whose will is manifested externally imposes the object of its will. Apart from the object desired, we must say, according to the traditional formula, that all subjective right implies an active subject and a passive subject.

Consequently, if we suppose the natural man isolated, he cannot have any rights. Man at birth cannot bring rights into the society which he enters; he can have rights only after he has entered society and because he has entered into relation with other men; Robinson on the island has no rights; he acquires them only upon meeting human beings. Man cannot bring into and maintain rights in society which he does not have, which he could not have until he entered it. He has acquired rights, if he has any, only after becoming a member of the society of which he is a part, and because he has become a part of it. Up to the time he enters into society, man certainly has faculties; but he has not, he cannot have, rights.

Thus the whole individualistic doctrine breaks down. Man cannot oppose society with natural rights which he has not; he cannot

place in opposition to it rights that he has only because he lives in society.

Nevertheless, we might still admit, strictly speaking, the individualistic doctrine and the now disproved and contradictory postulate concerning natural individual rights, if it truly and efficaciously gave us a solution of the problem of legal limitations upon the powers of the State. But upon a more careful and final consideration of the matter, it can be seen that the individualistic doctrine does not solve the problem. In reality, it supposes and opposes two contradictions, the sovereignty of the State and the autonomy of the individual.

Let us recall the terms of the problem. The State is sovereign; but such sovereignty has its limits. The foundation for and the determination of these limitations are found, according to the individualistic doctrine, in the existence of the natural rights of the individual anterior to the State, which the latter must respect and guarantee, but to which it can add limitations to the extent necessary to protect the rights of all.

This being granted, we cannot escape the following dilemma. Either the autonomy of the individual comes to limit the power of the State, to determine the extent of the restrictions which it can bring to bear upon the individual activity of each — in which case the State ceases to be sovereign, since there is a will other than its own which comes to determine the limitations upon the manifestations of its own will — and so the sovereignty of the State disappears; or else, by reason of this sovereignty, the State determines freely and without reserve the restrictions which in its sovereign discretion it thinks ought to be brought to bear upon the autonomy of the individual. In that case it is the autonomy of the individual which disappears.

The individualistic doctrine reduces itself necessarily either to the negation of political sovereignty and to anarchy, or else to the negation of individual liberty and to political absolutism — to the anarchism of a Stirner and of a Bakounine, or to the absolutism of a Rousseau and of a Hegel, or still further, to Jacobin or Caesarian despotism.

The dilemma into which the individualistic doctrine leads did not escape some of the masters of philosophy and of legal and political theory either in France or in Germany. That explains

the prodigious effort in both countries to maintain intact the sovereignty of the State and at the same time to protect the autonomy of the individual. This fruitless effort has had no result other than to strengthen the theoretical foundation of unlimited sovereignty, while creating an illusion through skillful sophistry that the autonomy of the individual is secured.

These attempts, however, have had a considerable influence in the world. They deserve to be considered. They are represented by the great names of Jean Jacques Rousseau, of Kant, and of Hegel, whose political doctrines, even though they do not in reality follow one another directly, have one thing in common, namely, that they tend to show the limitless sovereignty of the State and to reconcile it with the autonomy of the individual. Neither Rousseau, nor Kant, nor Hegel was a jurist by profession; but their doctrines have had a direct and definite influence on juridical theories in France and in Germany. Beyond the Rhine, in Jhering and Jellinek they have led to doctrines concerning the voluntary auto-limitation of the State which are both subtle and singularly dangerous for liberty; in France they have brought about the reaction to juridical realism of Royer-Collard and of a few contemporary jurists.

CHAPTER II

JEAN JACQUES ROUSSEAU AND THE DOCTRINE OF THE SOCIAL CONTRACT

SPEAKING of the Declaration of Rights of 1789, M. Paul Janet writes: "Such an act does not come from Montesquieu, but from J. J. Rousseau." [1] M. Tchernoff, in an interesting study of Montesquieu and J. J. Rousseau, declares that the philosophy of the Declaration of Rights of Man comes from J. J. Rousseau.[2] The opinion thus expressed by these two authors is widespread but nevertheless is radically wrong. The *Contrat Social* is at the antipodes of the Declaration of the Rights of Man, full of liberal individualism, and proclaiming to the world the fundamental duties which limit the powers of the State. J. J. Rousseau is the father of Jacobin despotism, of Caesarian dictatorship, and, upon closer observation, the inspirer of the doctrines of absolutism of Kant and of Hegel. And to prove this it is only necessary to read the *Contrat Social.* But it must always be read in its entirety.

I

That Rousseau is a convinced individualist we cannot deny. He, too, presupposes the natural man, free and independent, endowed at birth and by virtue of his nature with rights, which in the aggregate form the autonomy of the human person. But in Rousseau's theory these rights of the individual cannot place restrictions upon the sovereign power of the State which remains without limit. The originality of Rousseau, like that of Hegel some years later, consists in attempts to prove that, in spite of this power of the State, man remains free and retains the fullness of his autonomy. To prove it the philosopher of Geneva piles sophism upon sophism. But the eloquence of his style has caused illusion, and the influence of the book has been as considerable as it has been harmful.

Thus, according to Rousseau, man is born free and independent;

[1] Paul Janet, Histoire des doctrines politiques, second edition, Vol. II, p. 612.

[2] Revue du droit public, 1903, II, p. 96.

it is by an act of free will that he enters into society. By the social contract he loses a part of his natural independence, but in return he acquires the guarantee of his rights — a security. By the social contract he abandons only those of his natural rights the loss of which is necessary to the maintenance of society. The other rights he retains. But it is the sovereign who determines, with full and absolute independence, the extent of the rights taken away and those retained. And so the sovereignty of the State remains unimpaired and complete.

In spite of all this unlimited power of the State, man, according to Rousseau, remains the autonomous individual which he is by nature.

How can this miracle be accomplished? By the sophistical invention of the social contract as understood by Rousseau. By the effect of the contract, that is to say, by the effect of the tacit adherence of the individuals to the social grouping to which they belong, there is formed a common personality (*un moi commun*), which is the collective will of the group — as Rousseau expresses it, the general will. This will of the group or general will is the sovereign will of the State, and this it is which, without any reservation, can bring about all the restrictions on the free activity of the individual which it thinks expedient; on two conditions however: First, that it ordain them directly and not through representatives; second, that it ordain them in the form of a general disposition. Can the individual, whose activity is so limited and reduced by the State in its sovereign capacity, complain, and claim that by such arrangement he ceases to be free and loses his autonomy? Not at all. Since this will of the State is the general will, it is the will of all, and accordingly it is the individuals themselves who create such restrictions upon their own wills. They are not, therefore, in submission to a will superior to their own. They are in submission to a general will formed by their own wills. They thus remain perfectly free.

Let us not say that, for the expression of this general will, there is formed a majority and a minority, and that in reality it is the majority which imposes its will upon the minority; that is to say, one group of individuals imposes its will upon another group, and this majority will be naturally and unconsciously oppressive. Such objection, answers Rousseau, is unimportant. In fact, if in

the assembly of the people the majority want something contrary to the wishes of the minority, it simply goes to show that the persons making up the minority are mistaken, since the majority expresses the general will and the general will cannot err.

Thus, by this sleight-of-hand performance the sovereignty of the general will and the autonomy of the individual remain complete and are reconciled in this powerful synthesis, the State. In his philosophical rubbish Hegel does not say more.

II

Everybody knows the celebrated opening passage of the *Contrat Social*, which begins: "Man is born free, and everywhere he is in chains. Many men believe themselves to be masters of others and are even greater slaves than they. How has this change been brought about? I do not know. What can make it legitimate? I think I can solve this question." The purpose of the work is thus clearly and distinctly formulated: to show how it is legitimate that man who is born free should everywhere be in chains; or, what is the same thing, how it happens that the limitless sovereignty of the State should be legitimate, in spite of the fact that man is naturally free. It can be thus only if we prove that this sovereign power exerted against individuals is a power which the individuals exercise against themselves. The proof is impossible; but the eloquence of Rousseau has deceived many into believing that he had proved it.

This limitless State sovereignty grows out of the social contract, the essential elements of which, according to Rousseau, are these: "If then," he writes, "we disregard in the social pact what is not of its essence, we shall find that it is reduced to the following terms: each one of us places his person and all his power in common under the supreme direction of the general will, and each of us receives in return as a member an indivisible part of the whole. Instead of a particular person, each as a contracting party, this act of association produces forthwith a moral and collective body, composed of as many members as the Assembly has voices, and which receives from this same act its unity, its common ego (*son moi commun*), its life, and its will. This public person that is thus formed by the union of all the others was formerly designated the city, but now is styled a republic or body politic, which, however, is called by its members the State when it is passive, the sovereign

when it is active, and the power when it is compared with similar bodies." [3]

III

Has this sovereign State a limitless power over the individual? Or, on the contrary, is its action limited by a principle superior to itself? By such contract does the individual lose all his rights as against the sovereign? Or, on the contrary, does he retain certain of his rights, which, remaining, come to limit the action of the State?

If one were only to read chapter four of the second book of the *Contrat Social*, one might think that Rousseau, like Locke and the authors of the Declaration of Rights of 1789, admits the reservation by the individual in society of his natural and indefeasible rights that come to limit the power of the State. The chapter is in fact entitled *Limitations upon the Sovereign Power*. In it we read: "It is settled that all that each individual loses by the social pact in respect to his rights or his liberty is merely that which is of importance to the community. All the services that a citizen can render to the State he owes to it as soon as the sovereign calls upon him for such services; but the sovereign, on the other hand, can burden the subjects with no restraints not useful to the community."

It is probable that writers who assert that J. J. Rousseau was the inspiration of the profoundly liberal doctrine of the Declaration of Rights confined their reading to this passage of the *Contrat Social*. If they had read what precedes and what follows, they certainly would not have formulated any such idea. Taken by itself, the passage of Rousseau previously cited is in absolute contradiction with the work as a whole. In this same chapter four Rousseau expresses himself very clearly: "It is a question," said he, "of making a clear distinction between the respective rights of the citizen and of the sovereign, that is, of the duties which the former must perform in the capacity of subjects, and of the natural right which they must enjoy in the capacity of men." Therefore, if the individual retains certain rights in society, he does so in his capacity as a man. As citizen he is bound by the omnipotence of the State. Rousseau says this also in so many words. But if the citizen is bound by the omnipotence of the State in the capacity of citizen, we can hardly see how the permanence of his natural rights as man can

[3] Contrat social, Bk. I, chap. VI.

limit this unlimited power. Does not Rousseau make this distinction for that matter, and assert that the human personality in its entirety is completely swallowed up by the collective person, the State?

In chapter six of the first book of the *Contrat Social* is the following: "These clauses [of the social pact] can be reduced to a single proposition: the total alienation by each associate of all his rights to the whole community. . . . Furthermore, the alienation being made without reservation results in a union as perfect as is possible; and no associate has anything left to which he can lay claim, because, if there remained some rights in the individuals — since there would be no common superior to pronounce between them and the public, each one being in certain respects his own judge — he would soon pretend to be his own judge in everything; a state of nature would result; and the association would become necessarily tyrannical or vain."

That is not all. In the seventh chapter of the first book entitled *The Sovereign* we read: "We must remark furthermore that the deliberate acts of the State, which can place all the subjects under obligation to the sovereign on account of the two different aspects from which each may be considered, cannot for that reason place the sovereign under obligation to itself, and that consequently it is contrary to the nature of the body politic that the sovereign should impose a law on itself which it could not violate. As it can only be considered from a single point of view, it is then in the position of an individual contracting with himself; according to which we see that there is and can be no kind of law fundamentally obligatory upon the body politic — not even the social contract."

Let us compare this proposition with paragraph three of title one of the Constitution of 1791: "The legislative power shall not enact any laws which shall infringe upon or be a hindrance to the exercise of the natural and civil rights herein contained and guaranteed by the Constitution." Let us now ask the authors previously mentioned whether or not they persist in thinking that the Declaration of Rights of 1789 and the guarantee of such rights in the Constitution of 1791, which is only a development of the former, have been taken from the *Contrat Social.*

To conclude, if the absolutism of Rousseau need be proved, it would be sufficient in doing so to quote again the passage in which

the philosopher, having said that "each one loses, by the social pact . . . only that part of his freedom the use of which is of importance to the community . . .," hastens to add: "We must agree also that the sovereign is the judge of this important matter."

Let us also quote the passage relative to the religion of the State: "There is, then," writes Rousseau, "a purely civil profession of faith, the principles of which are to be determined by the sovereign, not precisely as a dogma of religion, but as sentiments of sociability, without which it is impossible to be either a good citizen or a faithful subject. Without being able to compel anyone to believe them, the sovereign can banish from the State unbelievers. It may not banish such a person as impious but as being unsociable, as being incapable of seriously cherishing laws and justice, and of immolating himself if need be to duty. But if anybody, after having publicly recognized these very dogmas, conducts himself as if he did not believe them, let him be punished by death; he has committed the greatest of crimes; he has lied before the laws." Here is certainly the language of a true liberalist; and perceive how truly he has given inspiration to the Declaration of Rights of 1789, in which it is written that "nobody should be interfered with in respect of his opinions, even his religious belief!"

Rousseau does not content himself for that matter with affirmations in respect to the existence of this civil religion which each one must believe and practice under penalty of death. He formulates its dogmas. "The dogmas of civil religion," says he, "must be simple, few, expressed with precision, without any explanation or commentary. The existence of a powerful, intelligent, beneficent, foreseeing, and provident Divinity, the life to come, the happiness of the upright, the punishment of the wicked, the sanctity of the social contract and of the laws; these are the positive dogmas. As to the negative dogmas, they may be limited to one only — intolerance. It is one of the creeds which we have excluded."

We should be much mistaken if we were to believe that Rousseau, in formulating as a dogma the exclusion of intolerance, meant to leave to citizens their free belief and the free practice of their religion. The intolerance which he intends to exclude from the State is simply Catholicism. Let us quote here the end of the chapter: "Now that there no longer is nor can any longer be any exclusive national religion, we must tolerate all religions which

tolerate all others, in so far as their dogmas have nothing in contravention of the duties of a citizen. But whoever dares to say that, outside the church there is no salvation, must be banished from the State. . . . The reason for which, it is said, Henry IV embraced the Roman religion should be sufficient to make every honest man leave it, especially any prince who has any reasoning power." To tolerate the different religions, but to banish Catholics; that is the last word of J. J. Rousseau in matters of religious liberty.

IV

Does this limitless sovereignty of the State leave intact the autonomy of the individual? Yes, answers the philosopher; and it is the principal purpose of his theory to prove it. By such theory he clears the way for the philosophers and jurists of modern Germany who, following him, will come to assert that the individual can find the fullness of his being only in the State; and that the latter can be all powerful without lessening the autonomy of the individual. Rousseau says nothing more than to maintain that by the operation of the social contract, which creates the social will, the individuals, in obeying this collective will, will be obeying only themselves. The more powerful the collective will, the more powerful will become the individuals themselves since the collective will is composed only of individual wills. Thus, to affirm the limitless sovereignty of the collective will of the State is to affirm the unrestricted autonomy of the individual. The individual autonomy springs from the sovereignty of the State; and it is in direct ratio to this sovereignty.

This sophistry is found on every page of the *Contrat Social;* it is as it were its *Leit-motiv.* In chapter six of the first book Rousseau states the problem thus: "To find a form of association which will defend and protect, with the combined strength of all, the persons and the goods of each associate, by which each one in combination with all the others will nevertheless be obeying only himself and will remain just as free as before." The social contract furnishes the solution. "Such is," according to the philosopher, "the fundamental problem, the solution of which is found in the social contract."

How can that be? The answer is: "The sovereign, being created only by the individuals that go to make it up, does not have nor can it have any interest contrary to theirs; consequently, the

sovereign power needs no guarantee towards its subjects, because it is impossible for the body to desire to injure all its members; and we shall see hereafter that it can do harm to none in particular. The sovereign from its very nature is always what it should be."

An objection comes to mind naturally. The expression of this collective will implies the formation of a majority and a minority. In fact it is not the collective will which is imposed on the individual will, it is the will of a group having a majority which assumes the right to impose itself upon the minority; and by that very situation the whole argument breaks down. This does not embarrass our philosopher. He answers the objection by a pure sophism. Let the reader judge for himself. "Each individual," he writes, "can in the capacity of man have an individual will contrary or dissimilar to the general will which he has as citizen; his private interest can prompt him quite differently from the common interest. . . . In order, then, that the social pact may not be a vain formulary, it tacitly contains this agreement which alone can give strength to the others, that whoever shall refuse to obey the general will shall be constrained by the whole body; signifying nothing more than that he will be forced to be free."

We have here the gist of the theory, and at the same time, the inspiration for the despotic doctrines of Hegel and of contemporary German jurists. Man, according to this conception, is truly free only if he obeys the State passively. If he refuses to do so, he refuses to be free; and the commanding and constraining power of the State is without limit because it has no other object and no other effect than to constrain man to continue to be free. The greater the power of the State, the freer the individual. The idea occurs frequently in numerous other passages of the *Contrat Social*. The third chapter of the second book is entitled: *Whether the General Will can Err*, and begins with this sentence: "It follows from what precedes that the general will is always right and always tends toward public utility."

In the fourth chapter of the second book we read: "What is, properly speaking, an act of sovereignty? It is not an agreement of the superior with the inferior, but an agreement of the body with each one of its members. . . . So long as the subjects are bound only to such agreements they obey nobody other than their own will."

The second chapter of the fourth book has probably the most characteristic passage: "Apart from the primitive contract, the voice of the greatest number always binds all others; it is a consequence of the contract itself. But, it is asked, how a man can be free and under obligation to conform to wills which are not his own? How are opponents free and yet bound by laws to which they have not consented? I answer that the question is badly phrased. The citizen consents to all the laws, even to those that are passed in spite of him, and even to those that punish him when he dares to transgress them. The unvarying will of all the members of the State is the general will; it is by means thereof that they are citizens and are free. When a law is proposed in the assembly of the people, what is asked of them is not precisely whether or not they approve the proposition or whether they reject it, but whether it be in conformity with the general will, which really is theirs. Each one in voting expresses his opinion on the matter, and by the counting of the votes declaration of the general will is obtained. When therefore an opinion contrary to my own prevails it proves nothing more than that I must have been mistaken and that what I supposed to be the general will was not. If my particular viewpoint had prevailed, I should have done something else than what I really willed; and in that case I should not have been free."

Man is free, then, only when he is passively in submission to the orders of the general will. According to Rousseau the all-powerful State creates the liberty of the individual. It will be found that Hegel, in another way, says nothing different.

V

It is important, nevertheless, to notice that, according to Rousseau, the act of sovereignty of itself is binding upon all individual wills without limitation. The act of sovereignty is the law. But when is it law? Rousseau explains that very clearly.

"When all the people," he writes, "decree concerning all the people, they consider only themselves. And if a relation is then created, it is between the whole from one standpoint and the whole from another, indivisible, however, at all times. Then the matter concerning which they decree is general, like the will that decrees. Such an act I call a law." [4]

[4] Contrat social, Bk. II, chap. VI.

And a little further on he writes: "When I say that the object of laws is always general, I mean that the law considers subjects collectively and actions as abstract; never a man as an individual, nor an action as particular. . . . According to this idea we should not ask any longer who may enact laws, inasmuch as they are acts of the general will; nor whether the prince is above the laws, inasmuch as he is a member of the State; nor whether the law can be unjust, inasmuch as no one is unjust with respect to himself; nor how one can be free and still bound by laws, inasmuch as they are only registrations of our wills. Furthermore, we see that the law unites the universality of the will to that of the object; and what a man, whoever he may be, orders in his own right, is not a law; neither is what the sovereign himself orders about a particular object a law but a decree; not an act of sovereignty, but of magistracy." [5]

This constitutes, we must admit, a certain limitation upon the power of the State. The sovereign can impose commands and restrictions without limit on individuals; but he can do so only on condition that these commands and restrictions be the same for everybody; because if he imposed them on some and not on others, the decree so made would not be a decision through a general medium, but one through individual channels, thereby ceasing to be an act of sovereignty.

Hence Rousseau writes very logically as follows: "We can see by this that the sovereign power, wholly absolute, wholly sacred, wholly inviolable as it is, does not exceed and cannot exceed the limits of general covenants, and that every man can fully dispose of that which has been left to him of his goods and of his liberty by these covenants; so that the sovereign is never in a position to impose more on one subject than on another, because when the transaction becomes particular his power is no longer competent." [6]

Finally, according to Rousseau, the State is omnipotent. It can do anything by means of a general enactment voted by the assembly of the people, expressing the general will — the will of the State. This will cannot make a mistake. It creates law because it so wills; and man remains free, whatever be the restrictions that the general will imposes upon him acting through a general medium. Rousseau himself summarized his doctrines in this way: "In every political

[5] Contrat social, Bk. II, chap. VI.

[6] Contrat social, Bk. II, chap. IV.

state there must be a supreme power, a central organization to which everything will be referred, a principle from which everything shall be derived, a sovereign who shall be all powerful . . . ; it is of the essence of sovereign power that it be unlimited; it must be of unlimited power to be of any value."[7]

The formula for that matter was not new. It had been promulgated in almost the same terms in the seventeenth century by the Protestant pastor, Jurieu, one of the forerunners of Rousseau, who, by mental aberrations which I do not understand, has been sometimes presented as a liberal.[8] The celebrated pastor wrote: "There must be in societies a certain authority which need not be consonant with reason in order to give validity to its acts; now this authority is vested only in the people."[9]

Rousseau's doctrine was also only a new principle applied to the conception of freedom in the ancient city, a conception which Fustel de Coulanges and Hermann have made so clear. The former says: "It is a singular error among all human errors to believe that in the ancient cities man enjoyed liberty. He did not think that there could exist rights as against the city and as against his gods. To have political rights to vote . . . that is what they called liberty. But man was none the less enslaved to the State."[10] And Hermann writes: "As against the State the freedom of a Greek in reality consists simply in knowing that he is dependent on no power since each of his fellow citizens is on equality with him by the power of the law."[11] Is not this exactly the doctrine of J. J. Rousseau?

VI

And nevertheless, due to the prestige of style and the privileges of eloquence, the doctrine of the *Contrat Social* has spread broadcast in the world and has exercised a profound influence on political ideas. It is to the honor of France not to have applied it except for a very brief moment of its history. It is to the credit of French jurists always to have repudiated, by a very large majority, the absolutist conclusions formulated by J. J. Rousseau. Undoubtedly,

[7] Lettres écrites de la montagne, pt. II, letter VII.

[8] As to Jurieu, see Lureau, Les doctrines politiques de Jurieu, 1914.

[9] Jurieu, XVIII° lettre pastorale, Rotterdam, 1688, p. 418.

[10] Fustel de Coulanges, La cité antique, new edition, p. 267.

[11] Hermann, Lehrbuch der griechischen Rechtsalterthümer, Thalheim's edition, 1884, p. 28.

we have often invoked the authority of the citizen of Geneva, but in attributing to him doctrines which were not his. We placed under his authority the conception of natural individual rights protected by the social man and thereby limiting the powers of the State. We have seen that such was never his belief. But in attributing it to him we did so in good faith.

In fact, Rousseau's theories of absolutism have always been energetically repudiated in France, as well by the partisans of the metaphysical conception of the State as by those who uphold the realistic conceptions. The latter conceptions, as we shall see later, owe their origin in France above all to the difficulty that, do what we might, we could never, under the metaphysical conception of the State, construct a solid foundation for the juridical limitation of political powers. It goes without saying, then, that the realistic jurists have energetically repudiated the doctrines of the *Contrat Social.*

But the partisans of the metaphysical conception of the State have equally repudiated these doctrines of absolutism. I desire to quote at this point a great professor, who up to his recent death, was the most representative authority in France as to the metaphysical conception of the State. I mean Esmein, the illustrious and the lamented Esmein. In the last edition of his *Précis de droit constitutionnel* he writes: "It really seems as if sovereignty must necessarily be unlimited, and that consequently the right of the State should also be unlimited. [Esmein quotes in a footnote the passage, before mentioned, from the *Lettres de la montagne* in which J. J. Rousseau affirms this omnipotence of the sovereign.] Such was incontestably the conception of the ancient Greek with respect to the sovereign. It is on the contrary one of the best established and the most prolific of ideas of modern times that the individual has rights anterior and superior to those of the State, which consequently must be respected by the State. . . . Once this principle is admitted, it forms with all its consequences an essential element of constitutional law. In fact, it determines more narrowly than any other the limits upon the exercise of sovereignty, because it forbids the sovereign to make laws which interfere with individual rights, and commands it to promulgate those necessary to assure the efficacious enjoyment of these rights." [12]

[12] Esmein, Droit constitutionnel, Barthélemy's edition, 1915, pp. 29 and 30.

In Germany, on the contrary, the pure theory of Rousseau has been the direct inspiration of all the systems elaborated for the purpose of establishing the unlimited power of the State while preserving the appearance of protecting and guaranteeing the autonomy of the individual. The central idea of the *Contrat Social,* according to which man is only free because of being a member of the all-powerful State, is that he is all the freer the more energetically the omnipotence of the State exerts itself; that the man whose acts of individual will are forbidden and condemned by the general will does not cease being free because, on the contrary, the general will does nothing more than to *compel him to be free.* This idea is found again, as such, in the doctrines of Kant and of Hegel. In their philosophical jargon they say nothing which the philosopher of Geneva had not clearly stated. Without doubt on many points of detail Kant and Hegel diverge from the *Contrat Social*; but the fundamental idea is exactly the same: Man is free only by means of and as part of the State, and the omnipotence of the latter not only allows the autonomy of the individual to subsist intact but alone assures its reality.

The *Contrat Social* along with the civil religion already announces the deification of the State. Kant will teach the mystery of the political trinity patterned after the Christian mystery of the divine Trinity. Hegel will proclaim solemnly and without circumlocution the divinity of the State, which is thus the incarnation of good in itself. And so for him as for Rousseau, it is only through the State that the individual finds a full realization of his moral being; the power of the State is unlimited, and this omnipotence alone assures and guarantees the autonomy of the individual.

Kant and Hegel were not jurists by profession; but their theories of right have directly inspired all the professional jurists of contemporary Germany.

CHAPTER III

KANT'S POLITICAL AND JURIDICAL DOCTRINE

KANT'S political and legal philosophy, which is allied with his philosophical system as a whole, has been set forth particularly well in a book entitled *Éléments métaphisiques de la doctrine du droit.*[1] In the two works entitled *Critique de la raison pratique* and *Fondements de la métaphisique des moeurs* Kant wished to establish as the fundamental principle of all morality, the law of duty — the categorical imperative — this principle being determined by a method of pure reason. Kant desired thereafter to develop the rational consequences of the principle stated; and that is what he calls the metaphysic of morals, of which the book previously mentioned, namely, *La doctrine du droit,* forms the first part.[2]

Now what is it exactly that Kant means by metaphysic of morals?

I

By metaphysics Kant means a theory of knowledge *a priori,* based on simple concepts. And so all moral rules must be derived logically from a principle; they are essentially *a priori* and are only moral laws as such.

The metaphysic of morals, according to the philosopher, is comprised of two parts. One, the philosophy of law, which treats of such duties as can be made subject to actual legislative control and called by Kant, for this reason, legal duties. The other, the doctrine of virtue, consisting of those duties which cannot be subjected to legislation, and which, depending only on one's state of mind, are thus purely duties imposed by the conscience. To these two parts of the metaphysic of morals or the general theory of duties Kant has devoted a special treatise.[3]

[1] Éléments métaphisiques de la doctrine du droit (Part I of La métaphisique des moeurs), J. Barni's translation, Paris, 1853. [There is an English translation, entitled "Kant's Philosophy of Law," by Hastie, 1887. — Translator.]

[2] Barni, Introduction to the translation of Éléments métaphisiques de la doctrine du droit, p. 22.

[3] Barni, *l. c.* p. 22.

Thus the philosophy of law (*la doctrine du droit*) includes such outward manifestations as can be the object of actual legislative control, not depending only on conscience, as, for example, the obligation of keeping one's engagements. These duties are not conscientious scruples, but legal duties, the theory under which they are expounded being a theory of right.

The following question then arises: What are the immutable principles which are to serve as a foundation for all regulations of such outward action, or in other words what are the principles of natural law (*du droit naturel*)? Above and superior to all codes there are rules which, far from deriving their value from a piece of legislation, furnish to each enactment its type and its criterion. They are the laws which emanate from reason itself.

Kant writes: "What is the universal criterion by means of which we can recognize in general the just from the unjust? That is what the jurist cannot determine, unless he disregards, for a time, these empirical principles, and if (while using these laws as a conducting current) he does not seek the source of his judgments in pure reason, as that through which alone the foundation of all positive legislation is possible. A philosophy of law purely empirical may be (like the wooden head in the fable of Phaedra) a very beautiful head, but alas without brains." [4]

Then if we consider the conception of law from this point of view, and if we look at it in connection with the obligation to which it corresponds, it assumes the following form: First, right applies only to the external relations of men among one another; right only appears in connection with the relations of individuals with one another; the idea of right is therefore that of a relation between persons. Second, this relation is not founded on pure desire or on simple need; it is a relation between the liberty of each person and that of all others. Third, in this reciprocal relation we should not consider the particular end which each person can propose for himself as to the use which he is to make of his liberty. The question is to know whether such use has in it anything contrary to liberty itself, of such a nature that it is regulated by a general law (*loi*) which consists essentially in the concurrence of the liberty of each with the liberty of all.

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[4] Kant, Doctrine du droit, Barni's translation, pp. 42 and 43.

Kant thus concludes: "Right is therefore the sum of the conditions by means of which the will of one can be in harmony with that of others according to a general rule (*loi*) of liberty. All action is in conformance with right or justice, which permits the free will of each to be in agreement with the liberty of all according to a general rule (*loi*)." [5]

Right thus understood implies the faculty of constraining. In fact as soon as a certain freedom of action has conformed to the principle of general liberty, it is just. All that is contrary to it is, by that very fact, contrary to this principle and consequently unjust. Resistance to anything preventing such harmony is then in conformance with the principle of general liberty and therefore is just. "Consequently," says Kant, "right implies, according to the principle of contradiction, the faculty of constraining one who infringes it." [6]

Right is thus finally a moral faculty of obliging others and of obliging them under the sanction of constraint. "It is a legitimate faculty in regard to them." [7] Thus understood right divides itself into *innate right and acquired right.*

Innate right (*le droit inné*) is nothing more or less than natural liberty, the endowment of each human being, just because he is human. This liberty is inviolable in each person, at least to the extent that it can remain in harmony with the liberty of others. "This unique and native right, which each possesses simply because he is a human being, is liberty — independence from all constraint imposed by the will of anybody else — inasmuch as it is in agreement according to such general principle with the liberty of every one." [8]

All men, having the same innate right, the same liberty, the same autonomy, are naturally equal among themselves; they are naturally free and equal, and this equal liberty of all is, Kant reiterates, "the independence which does not allow us to be forced by others into doing anything more than that to which we can oblige them in turn. . . . It is this characteristic of being his own master which man possesses." [9]

As to *acquired rights*, they are those which man acquires in

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[5] Kant, *l. c.* pp. 43 and 44.
[6] *l. c.* p. 45.
[7] *l. c.* pp. 54 and 55.
[8] *l. c.* p. 55.
[9] *l. c.* p. 55.

organized society or in the State, and this definition brings forward, precisely, the problem of the State.

II

Kant's philosophy of law, up to this point, singularly resembles that which is contained in the Declaration of Rights of 1789. It is, we may say, the classical individualistic doctrine. But, taking into consideration the State, what is to become in the Kantian system of this autonomy of the individual so energetically affirmed by the philosopher of Königsberg? What is the State? What is the extent of its power? How can the sovereignty of the State and the autonomy of the individual be reconciled with each other?

The autonomy of the individual, which we have just defined, is that of man in the state of nature. But it is important to note that in the Kantian doctrine the state of nature is not, as in the conception of most of the French philosophers of the eighteenth century and of J. J. Rousseau, that of man living alone and without association with other men. The state of nature is not the opposite of the social state, because even in the state of nature there is nevertheless a society, be it only that of the family. The state of nature for Kant is simply the opposite of the civil state; *i. e.* the opposite of that in which what belongs to me and what belongs to you is guaranteed by positive laws and protected by public powers.

When a society is constituted in such a way that what is yours and what is mine are guaranteed to us by positive laws and by public powers, it is a constituted State; there exists a State.

It is, for that matter, an innate duty for individuals to organize themselves into a State. For "if we imagine men as good and as friendly to right as we should desire, this duty results *a priori* from the rational idea of a state which is not juridical before the establishment of a legal and public state; the individuals, the peoples, and the States, as regards one another, could have no guarantees with respect to one another against violence. . . . Consequently, the first thing we must admit, if we do not wish to renounce all idea of right, is this principle: that it is necessary to emerge from the state of nature where each one acts in his own way, and to unite with each and every one in common submission

to an exterior legal and public constraint . . .; that is to say, we must first of all become associated in a civil state." [10]

Man enters voluntarily into such relation as a result of a contract. A capital passage from Kant which was directly inspired by J. J. Rousseau should be quoted here: "The act by which the people organize themselves into a State, or rather the simple idea of this act which alone permits conceiving of its legitimacy, is the *original contract*, by virtue of which all the people set aside their freedom of action to resume it immediately thereafter as members of a commonwealth, that is, to receive back their liberty from the people, as a State. And we cannot say that the State, or that men in the State, have sacrificed for a certain end to be attained a part of their innate liberty of conduct. But each one has renounced entirely savage and unregulated liberty, in order to find his general liberty once more intact in a legal dependence, that is to say, in a juridical state, since this dependence results from his own legislative will." [11]

Is not the influence of Rousseau evident? Let us re-read chapter six of the first book of the *Contrat Social* entitled *Concerning the Social Pact*, particularly this sentence: "To find a form of association which will defend and protect the person and the goods of each associate by the combined strength of all and by which each one, uniting himself with all, need nevertheless obey only himself, thus remaining as free as before. Such is the fundamental problem the solution of which is found in the social contract. . . . If, then, we discard from the social pact what is not essential to it, we shall find that it reduces itself to the following terms: each one submits in common with the others all his power to the absolute control of the general will, and receives back again as an individual an indivisible part of the whole."

III

It is not only in expounding the theory of the formation of the State by the social contract that Kant appears as the disciple of Rousseau, but also in asserting the unlimited power of the State and in declaring that this omnipotence of the State does not exclude that which is quite contrary to it, namely, the liberty of the individual. In this respect he even goes further than the master

[10] Kant, *l. c.* p. 167.

[11] *l. c.* p. 172.

of Geneva, and he differs from the latter markedly in the application of the principle.

The passage which has been mentioned above shows Kant affirming like Rousseau that the individual, while being in submission to the all-powerful State born of the social contract, nevertheless keeps his general liberty intact, since this dependence results from his own legislative will. Rousseau had said: "The individual obeys no one, since in obeying the law he obeys only himself." More obscurely Kant says the same thing. And he does not even stop there.

Rousseau stated very clearly and very forcefully that the commanding power of the State was limitless, only on condition that it manifested itself by an act of sovereignty, properly so called, that is, by decision of the general will expressed directly by the assembly of the people and carried out by way of general provision. Rousseau maintained at the same time the unity and the indivisibility of sovereignty in its nature and in its exercise. He had even criticised with a biting irony, unquestionably directed toward Montesquieu, those who pretended to divide sovereignty while at the same time maintaining its existence intact as an indivisible unit. He compared them to "those Japanese jugglers who dismember a child, so they claim, before the eyes of the spectators, then by throwing all the members into the air — one after the other — cause the child to come down once more a living and complete whole." [12]

Kant would perform the trick of the Japanese jugglers. To use Rousseau's formula, [13] "after having dismembered the social body by a trick worthy of performance at a fair, he puts the pieces together again without our knowing how." The illusion is complete through the intervention of mystery and divinity. But the practical consequence is the reinforcement of the omnipotence of the State; the individual is no longer in the presence of a single sovereignty but of three. It is the political trinity patterned after the divine Trinity.

The State, says Kant, is one, but it is at the same time threefold. It is made up of three elements; of three elements which manifest their will separately. Each one of these elements is sovereign; each one of the manifestations of their will is sovereign;

[12] Contrat social, Bk. II, chap. II.

[13] Contrat social, *ibid.*

and, nevertheless, there is only one State, only one sovereign, one and indivisible in its essence. There is only one God; there are three divine persons, each having a divine will; and nevertheless, there is only one divine will, one and indivisible.

Kant writes in fact thus: "Every State contains within itself three powers, that is to say, the unity of the general will may be decomposed into three persons, *Trias Politica;* the sovereign power (*Herrschergewalt*), which is found in the person of the legislator; the executive power (*Vollziehendegewalt*), in the person who controls the enforcement of law, and the judicial power (*Rechtsprechendegewalt*), in the person of the judge, who renders unto each that which belongs to him according to law. It is like the three propositions of a practical syllogism: the major, which contains the law of a will; the minor, the command to act according to law, that is to say, the principle of *subsumption* of action according to law; and finally the conclusion, the judgment, which decides what is right in the case in question." [14]

There are, then, three distinct powers in the State, three powers, which we shall see later, in spite of their different names, are equally sovereign and omnipotent. But there is also a unity and logical indivisibility of the State, which in its essence is at the same time one and threefold. It is indeed the mystery of the political trinity patterned after the mystery of the divine Trinity, as the omnipotence of the State is patterned after the divine omnipotence.

IV

In Kant's doctrine, as in that of Rousseau, the sovereignty of the State manifests itself through the law. But for Kant it is the legislative power alone that requires charter of sovereignty; and the legislative power is the very will of the State in its very essence, that is, proceeding from no other, in the same way that the divine will is the will of God, the Father, which does not proceed from any other. "The State," says Kant, "is the union of a certain number of men under juridical laws." [15] Whence it follows that "the legislative power can belong only to the collective will of the people." [16]

[14] Kant, Doctrine du droit, Barni's translation, pp. 168 and 169.

[15] Kant, *l. c.* p. 166.

[16] Kant, *ibid.*

This power is limitless. But in nearly the same terms as Rousseau, Kant asserts that, in spite of this omnipotence of the legislative power, the autonomy of the individual remains entire because the legislative decision, emanating from the general will, can never do injury to the individuals who form this general will. The individuals having to obey only themselves are in subservience to nobody. This same fallacy is ever present.

"The legislative power," writes Kant, "can only belong to the collective will of the people. For as all right ought to proceed from this power it can do no wrong to any one through its laws. Now when some one individual decides something with reference to another, it is always possible that he perpetrate some injustice. But injustice is impossible in what he determines for himself. Hence it is only the united and consenting will of all, in so far as each decides the same thing for every one and every one for each — it is only, I say, the collective will of all the people that can be legislative." [17]

Kant adds a few pages further on: "We cannot say that . . . man in the State sacrifices a part of his inborn external freedom for a particular purpose. But he has renounced entirely his savage and unregulated liberty to find again all his general freedom intact in a legal dependence, that is, in a juridical State, since this dependence results from his own legislative will. . . . We may say that the will of the legislator, relatively speaking, in respect to what belongs to you and me, is irreproachable."

The German word used by Kant is *untadelig*, and the philosopher adds himself, in parenthesis, the French word *irrépréhensible*.[18] Under cover of this wise philosophical terminology, it is still simply the sophism of Rousseau: the legislative omnipotence of the State allows the liberty of the individual to subsist intact, for the legislative will of the State is the will of the generality of individuals forming the nation, and subsequently these are only in submission to their own will.

We must add that Kant, remaining in the realm of pure rationalism, considers the general will in itself, without taking his stand in realities, where this general will is only, to speak truthfully, the will of the majority. Criticisms of Kant have not failed to call attention to this, and to work out from it an objection to his doc-

[17] Kant, *l. c.* p. 169. [18] Kant, *l. c.* p. 173.

trine.[19] The philosopher would certainly have answered like J. J. Rousseau that the question should not be asked or is poorly phrased; that the question is only to learn when there is a general will, and that there is certainly a general will when the majority of the people has pronounced on one side. Like Rousseau he would have added that, if I am of the minority, that proves very simply that what I thought was the general will was not, and that in compelling me to obey the majority they merely compel me to accept my freedom.

V

But Kant does not stop here. We perceive, in fact, in his philosophy the first elements of the Hegelian philosophy of the divine character of the State, which is to be an important factor in the formation of contemporary German theories of absolutism and the mainspring of the imperialistic and pan-Germanist policy of the inseparable German government and German people.

Rousseau, while constructing his theory on the basis of the metaphysical and *a priori* statement that the social contract creates a common ego (*un moi commun*), which is the foundation of the indivisible and sovereign will of the State, at the same time one and collective, still remained in the domain of terrestrial affairs. Rousseau's State is a purely human creation; its power has nothing divine about it. With Kant it is not so; the power of the State is truly divine, and it is as such that it commands the respect and the veneration of men.

The power of the State is divine in its essence. Like the God of the Christians, it is, as we have seen, one and threefold. The political hypotheses resemble the theological hypotheses; and we have a dogma of the political trinity similar to the dogma of the divine Trinity. The power of the State is divine, because it is irreproachable, that is to say, infallible, and because of the fact that the people cannot inquire into its origin.

The people must always obey it, and, by virtue of that fact, must always be in obedience to the men who in fact hold the reins of authority. There has never been and will never be a legitimate revolution. The people must always obey; they must always obey

[19] See especially Barni's Introduction to the French translation of the Doctrine du droit, p. 174.

even those who have taken possession of the government by force and who, consequently, hold it only by means of force.

In verity, I must smile when I hear some of my junior colleagues [20] say: Modern Germany of absolutism and imperialism is no longer the Germany of Kant, the philosopher who built upon indestructible foundations the autonomy of the human person — the indefeasible right of the individual against the omnipotence of the State; it is the Germany of Hegel and of Jhering. No, let them not oppose Kant and Hegel. Both have worked out the same thing; like Hegel, Kant, in spite of his categorical imperative, in spite of his dream of perpetual peace, has been one of the greatest artisans of conceptions of imperialism and absolutism in the Germany of today.

I must quote at length the passages from his *Philosophy of Law* in which the ideas just summarized have been most clearly expressed.

"The origin of the supreme power," writes Kant, "from a practical point of view is inscrutable by the people who are under its authority. In other words, the subject should not reason too curiously as to its origin, as if the right of obedience due to it were to be doubted (*ius controversum*)." [21] What, then, is this intangible autonomy of the human person which Kant would defend, and which does not permit the individual to scrutinize the legitimacy of the authority of those who claim the right to issue commands to him?

Nor is the philosopher of Königsberg content to stop here. He continues: "For as the people, in order to be able to adjudicate with a title of right regarding the supreme power in the State must be regarded as already united under one common legislative will, it cannot judge otherwise than as the present supreme head of the State wills." [22] An attempt at demonstration follows: "Has

[20] See especially M. Ripert's article in which it is said: "Of all names [Goethe and Kant] are sacred . . . ; but it is not through Goethe and Kant that intellectual Germany can redeem itself today." (Le droit en Allemagne et la guerre actuelle, Revue internationale de l'enseignement, numbers published on May 15 and June 15, 1915.) As to Goethe's Germanism and imperialism, see a remarkable article by M. Louis Bertrand, Revue des deux mondes, the number published on April 15, 1915.

[21] Kant, Doctrine du droit, Barni's translation, p. 177. [I have translated here from the original (Kant, Metaphysische Anfangsgründe der Rechtslehre, 2 ed., 203). See Hastie, Kant's Philosophy of Law, 174. — Translator.]

[22] Kant, *ibid.* [I have followed Hastie's version, Kant's Philosophy of Law, 174. — Translator.]

a real contract of subjection in fact originally preceded; or, on the contrary, is it not the power which has first appeared, the law following afterwards? And can it be otherwise? These are entirely idle questions for the people who are now in submission to civil law; and at the same time they are dangerous questions with respect to the existence of the State. If, after having looked into the original creation, a subject wished to resist the actual reigning authority, such authority, by its laws, could rightfully punish him, could put him to death or banish him as being without the operation of the law." [23]

So we find that the sovereign law of the State is so sacred that it is a crime, punishable by death or banishment, not only to disobey it, but even to doubt its legitimacy and to resist it passively. This law is therefore divine because the characteristic of the divinity is precisely that of compelling obedience to it, as such, and of making sacrilegious those who deny, resist, or contest its divinity.

Yes, says Kant, this sovereign law of the State is divine. "A law which is so holy and inviolable that it is *practically* a crime even to cast doubt upon it, or to suspend its operation even for a moment, is represented of itself as necessarily derived from some Supreme, unblameable lawgiver. And this is the meaning of the maxim, 'All authority is from God'; which proposition does not express the *historical foundation* of the civil constitution, but an ideal principle of the practical reason. It may be otherwise rendered thus, 'It is a duty to obey the law of the existing legislative power, be its origin what it may.' Hence it follows that the supreme power in the State has only rights, and no (compulsory) duties toward the subject." [24]

The ruler of the State is thus truly divine, because God alone has rights without corresponding duties. Let them not talk to us any more about the liberalism of Kant; let them not tell us again that he has solemnly maintained the existence of the intangible liberty of the human person in his relation to the State; let them not oppose Kant to Hegel. Both have made the State divine, affirmed its omnipotence, proclaimed that the ruler of the State has only rights and no duties, and created the monstrous mentality of modern Germany.

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[23] Kant, Doctrine du droit, Barni's translation, p. 178.

[24] *Ibid.* [I have used Hastie's translation (pp. 174–175) here. — Translator.]

VI

Kant is not content with declaring that the legislative power is omnipotent; he also affirms the unlimited power of the *regent*, that is, of the man or group of men who are in control of the executive power.

Rousseau in speaking of the omnipotence of the sovereign had in mind only the general will directly expressed by the people. According to the philosopher of Geneva the government is the executive agent of the sovereign and no more. His acts only have validity and obedience is due them only in so far as they are in conformity with the general will, according to which such acts can be only acts of an executive nature. Rousseau, we have said, does not admit of the separation of powers. Sovereignty is one and indivisible; it is vested wholly in the general will of the people the decisions of which the government is charged to see executed.[25]

According to Kant, on the contrary, the *regent*, the prince, the government (all these synonymous expressions designating the man or group of men which to him meant the same thing as monarch — the incarnation of the executive power) is also vested, just as the legislator is, with an unlimited power without recourse. There is, therefore, not only an absolutism of the legislator, according to the philosophy of Rousseau, but also an absolutism of the monarch vested with executive power.

This is, for that matter, the logical consequence of the threefold conception of the political power. As God, the Son, is begotten by God, the Father, and as divine as He, so the executive power is begotten by the legislative power and is as sovereign as the latter. Sovereignty is one and indivisible; it is, nevertheless, in the unity of its essence composed of three elements, each one personified and all equally sovereign, as each one of the divine attributes is a divine person, as we have said before. The legislative power is *irreproachable*. "The executive function of the supreme ruler," says Kant, "is to be regarded as *irresistible*." [26]

Kant explains, it is true, that the orders which the holder of executive power gives to his ministers, to the magistrates, or to the people, are ordinances and not laws because they are particular

[25] Contrat social, Bk. III, chap. I.

[26] Kant, *l. c.* p. 173. [I have used Hastie's translation, p. 170. — Translator.]

decrees. "A government," he writes, "acting as an executive and at the same time laying down the law as the legislative power, would be a despotic government." [27]

But what guarantees are vested in the people against the ever possible despotism of the regent and of his government? That none exists is the answer of the philosopher. There can exist none, simply because the executive power, which is inherent in the ruler, is *irresistible* by definition. There does not exist, there cannot exist, there must not exist any guarantee against governmental despotism. The people can never refuse to obey the regent, that is, the monarch, and the representatives of the people can neither limit nor control governmental power. All limited monarchy is an absurdity.

Here must be inserted a paragraph which can leave no doubt as to Kant's belief: "Further, if the ruler or regent, as the organ of the supreme power, proceeds in violation of the laws, as in imposing taxes, recruiting soldiers and so on, contrary to the law of equality in the distribution of political burdens, the subject can interpose complaints and objections (*gravamina*) to this injustice, but not active resistance." [28] The logical conclusion is that the executive power is *irresistible* by definition.

The people cannot revolt against the legislative power nor can they revolt against the monarch. Moreover, he says: "And least of all when the supreme power is embodied in an individual monarch is there any justification for seizing his person or taking away his life. The slightest attempt of this kind is high treason; and a traitor of this sort who aims at the overthrow of his country may be punished, as a political parricide, even with death." [29]

I admit that Kant condemns a tyrannicide, and I approve. I believe also that he condemns insurrection; but in such disapproval we find ourselves at the culminating point of his philosophy, namely, the affirmation of personal power, without limit and without check as regards the monarch — a teaching which made way for the German doctrine of the *Herrscher*.[30] The passages in which Kant formulates this proposition are worth quoting at length:

"There cannot even be an article contained in the political

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[27] Kant, *l. c.* p. 174. [Hastie, p. 171. — Translator.]

[28] *l. c.* p. 178. [Hastie, 175. — Translator.]

[29] *l. c.* p. 180. [Hastie, 176–177. — Translator.]

[30] See *infra*, Chap. VIII, sections III and following.

constitution that would make it possible for a power in the State, in case of the transgression of the constitutional laws by the supreme authority, to resist or even to restrict it in so doing. For whoever would restrict the supreme power of the State must have more, or at least equal, power as compared with the power that is so restricted; and if competent to command the subjects to resist, such a one would also have to be able to protect them, and if he is to be considered capable of judging what is right in every case, he may also publicly order resistance. But such a one and not the actual authority would then be the supreme power; which is contradictory. The supreme sovereign power, then, in proceeding by a minister who is at the same time the ruler of the State, consequently becomes despotic; and the expedient of giving the people to imagine — when they have properly only legislative influence — that they act by their deputies by way of limiting the sovereign authority, cannot so mask and disguise the actual despotism of such a government that it will not appear in the measures and means adopted by the minister to carry out his function. The people, while represented by their deputies in parliament, under such conditions, may have in these warrantors of their freedom and rights, persons who are keenly interested on their own account and their families, and who look to such a minister for the benefit of his influence in the army, navy, and public offices. And hence, instead of offering resistance to the undue pretensions of the government — whose public declarations ought to carry a prior accord on the part of the people, which, however, cannot be allowed in peace — they are rather always ready to play into the hands of the government. Hence the so-called limited political constitution, as a constitution of the internal rights of the state, is an unreality; and instead of being consistent with right, it is only a principle of expediency. And its aim is not so much to throw all possible obstacles in the way of a powerful violator of popular rights by his arbitrary influence upon the government, as rather to cloak it over under the illusion of a right of opposition conceded to the people." [31]

[31] Kant, Philosophy of Law, Barni's translation, pp. 179 and 180. [Hastie, pp. 175–176. — Translator.]

VII

If no power can limit the authority of the regent — *irresistible* by definition — no more can there be any legitimate revolution against him, however tyrannical his authority may be. There may be occasion to change a constitution, when it is vicious in its provisions or in its operation. But this change can only be realized by the sovereign itself, by means of reformation, not by the people by means of revolution. "In the State," says Kant, "whose constitution is such that the people can legally oppose, by their representatives, the executive authority and its representatives (what is called a limited constitution), there can be no active resistance, but only one negative in its nature, that is to say, a refusal to act by the people represented by the parliament." [32] Even though revolution be illegitimate, a revolution can come to pass in a country; and, as a matter of fact, there have been numerous revolutions which have by violence overthrown the established government and have instituted a new régime. When the sovereign shall have ratified this revolution and shall have given a legal character to this new government, obedience is unquestionably due it. But before such ratification is obedience due a government born in fact of a revolution?

It seems that if Kant had been consistent with himself, he should have answered no. Every revolution being declared illegitimate, every government instituted by a revolution must be illegitimate; and no obedience can be due it. Nevertheless, so great is the superstitious respect of the philosopher for every established governmental power, whatever be its origin, that Kant affirms clearly that obedience is due every government sprung in fact from a revolution, because, although born of a revolution, it realizes the idea of government.

"For that matter," writes the philosopher, "when a revolution has once taken place and a new constitution is set up, the illegality of its origin and of its foundation could not relieve the subjects from the obligation of submitting themselves, as good citizens, to the new order of things; and they could not honestly refuse to obey the authority which actually has possession of the reins of government." [33] It is the necessary and logical consequence of this idea

[32] Kant, *l. c.* p. 183.

[33] Kant, *l. c.* p. 183.

that all authoritative power is sacred — is divine — and that it is never within the people's rights to ask for an account of its origin.

Even in Kant's time, nevertheless, this doctrine was sharply criticized, notably in an article published in the *Göttingen Journal* on the eighteenth of February, 1797. Kant thought that he ought to answer it with explanatory remarks.[34] He says: "While this view [which teaches the beauty of obeying the established power, whatever be its origin] is admitted to be paradoxical, I hope when it is more closely considered it will not at least be convicted of heterodoxy. . . . Now, it is asserted that obedience must be given to whoever is in possession of the supreme authoritative and legislative power over a people; and this must be done so unconditionally by right, that it would even be penal to inquire publicly into the title of a power thus held, with the view of calling it in doubt, or opposing it in consequence of its being found defective. Accordingly it is maintained, that '*Obey the authority which has power over you*' (in everything which is not opposed to morality), is a categorical imperative. This is the objectionable proposition which is called in question; and it is not merely this principle which founds a right upon the fact of occupation as its condition, but it is even the very idea of a sovereignty over a people obliging me as belonging to it, to obey the presumptive right of its power, without previous inquiry, that appears to arouse the reason of the reviewer." [35]

This, then, is the disputed doctrine very clearly stated. What is Kant's answer to the objection? In truth, he gives us nothing which refutes it, but only a new assertion as to the authority attendant upon the idea of power, and of the sanctity of the power of the State, even of that established by force. The following passage is worth quoting.

"The *idea* of a political constitution in general, involves at the same time an absolute command of a practical reason that judges according to conceptions of right, and is valid for every people, and as such it is holy and irresistible. And although the organization of a state were defective in itself, yet no subordinate power in the state is entitled to oppose active resistance to its legislative

[34] Remarques explicatives, published after La doctrine du droit, Barni's translation, p. 261.

[35] *Ibid.*, pp. 261 and 262. [Hastie, p. 256. — Translator.]

head. Any defects attaching to it ought to be gradually removed by reforms carried out on itself." [36]

Not only must we obey a State whose constitution is bad but we still must obey even when the power is in the hands of an usurper, because the power of the State is always sacred by virtue of its existence, whatever may be its origin. Kant adds: "The will of a people is naturally un-unified and consequently it is lawless; and its unconditional subjection under a sovereign will, uniting all particular wills by one law, is a fact which can only originate in the institution of a supreme power, and thus is public right and law founded." [37]

All established power then has its origin, as a fact, in violence; and it is violence, force, which is the foundation of public law. What, therefore, does it matter whether such and such a political power has sprung from a revolution. It is not because the power is legitimate that obedience is due it. We must obey it because it realizes a holy and divine idea.

"To permit," says Kant again, "a resistance to this supreme power, a resistance which limits such power, is a contradiction; for this power, then, which one might resist, would no longer be the supreme legislative power which determines what shall be or shall not be publicly right." [38]

This last passage summarizes very well the whole of Kant's political doctrine. It has been said that Kant's philosophy was that of the members of the Constituent Assembly of 1789 and 1791. What a mistake! To measure the whole distance which separates the philosopher of Königsberg from the framers of the Declaration of Rights of 1789, it is sufficient merely to recall article two: "The end of all political association is the conservation of the natural and indefeasible rights of man. These rights are liberty, ownership, guarantee, and *resistance to oppression.*"

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[36] Remarques explicatives, published after La doctrine du droit, Barni's translation, p. 263. [Hastie, p. 257. — Translator.]

[37] *Ibid.*, p. 263. [Hastie, p. 258. — Translator.]

[38] *Ibid.*, pp. 263 and 264.

CHAPTER IV

HEGEL'S JURIDICAL DOCTRINE

IN his excellent book, *Germany since Leibniz* (1890), M. Lévy-Bruhl, speaking of Hegel's philosophical system, wrote: "Few systems have left so profound a mark on the ideas, the customs, and even the history of a nation. If Hegelianism has not been able to subsist as a body of principles — being untenable, in fact, from the speculative point of view — its influence, nevertheless, can be seen everywhere in the domain of action, but diffused, and making itself felt through statesmen, publicists, and especially through historians as intermediaries. Many who are themselves impregnated with it, ignore or deny it. Judging the transformations of Germany in the nineteenth century from afar and as a whole, the rôle of Hegelian influence becomes, so to speak, detached from itself." [1]

What M. Lévy-Bruhl wrote in 1890 has received abundant proof in the actual event. The Hegelian doctrine can be found everywhere — in the politics of German statesmen, in the doctrines of the pan-Germanists, in the teachings of the Treitschkes and the Bernhardis, and in the systems of the professional jurists. It will here be traced, especially, through the teachings of the professional jurists.

I

To understand Hegel's philosophy of right and of the State,[2] it is necessary to understand the fundamental principles of his

[1] Lévy-Bruhl, L'Allemagne depuis Leibniz, 1890, p. 389.

[2] This doctrine was first outlined in an article published in 1801 after the peace of Lunéville and entitled, Considérations sur l'état de l'Allemagne. The doctrine is tersely stated in a work entitled Encyclopädie der philosophischen Wissenschaften im Grundrisse, which appeared in 1817, and which has been translated into French by Vera. The theory received development in full in the work entitled Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft (1821), which is the eighth volume of Hegel's complete works, published by his students from 1832 to 1887. [Translated by Dyde under the title, Hegel's Philosophy of Right, 1896. — Translator.] This work has not been translated into French. On Hegel, see especially Schérer, Hegel et l'hegelianisme in Mélanges d'histoire religieuse (1864); Noël, La logique de Hegel (1897); Archambault, Hegel (1912).

philosophical system as a whole, to which it is closely related. It is not a simple matter to explain it, inasmuch as it is singularly obscure. M. Lévy-Bruhl characterizes it correctly when he thus writes: "A powerful philosophy but difficult to understand, consciously containing contradictions within itself, and flattering itself that it has solved problems by transcending them." [3]

All historians of philosophy agree in believing that what especially characterizes Hegel's philosophy is the absolute identification of the intelligible and of the real, of logic and of metaphysics, of the forms of thought and of the laws of nature. "What is rational is real; what is real is rational."

In developing the necessary course of its ideas the mind reproduces also the necessary evolution of things. Logic, that is to say, the logical deduction of ideas, and evolution, that is to say, transformation — the continual unfolding of things — are but two sides of the same reality. "Thought (*la pensée*) is the real and universal principle of nature and of the mind (*l'esprit*)." [4]

But it is not thought in the ordinary sense of the word, that is to say, consciousness (*la conscience*). Consciousness is only a moment in the evolution of the idea (*l'idée*), peculiar to man, which exists only for itself and knows itself in me. Thought in the Hegelian conception — thought which is at the basis of everything — is the intelligible itself. But it is an immanent intelligible, inherent in things and not transcendent. It is neither object nor subject, but a superior term in which the object thought and the thinking subject become identical.

Hegel himself writes: "Thought produces itself as identical with itself, but which is at the same time like an opposing activity, existing for itself, and which does not separate itself from itself in this opposition. Science divides itself thus into three parts: First, logic, the science of the idea in itself and for itself; second, the philosophy of nature or the science of the idea as to its external existence; third, the philosophy of mind, as an idea which reverts unto itself from its exterior existence." [5]

The celebrated doctrine of Hegelian logic is especially known

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[3] Lévy-Bruhl, L'Allemagne depuis Leibniz, 1890, p. 391. In this sketch of Hegelian philosophy I have followed M. Archambault's book previously mentioned.

[4] Archambault, *l. c.* p. 15.

[5] Archambault, *l. c.* p. 16.

to us, that is, the identity of opposites and the development of logic by thesis, antithesis, and synthesis. To understand this doctrine, which at first appears singularly paradoxical, we must take into account the fact that it is directly and logically connected with the principle of relativity, understood not only as relating everything to the mind, but as creating a reciprocal relation of all things among themselves.

In his book on the logic of Hegel, M. Noël, wishing to explain the doctrine of the identity of opposites, writes: "If everything is relative, no single reality has any truth except in its relation with all the others; that is, each one, taken in itself, isolated from its relations, is contradictory and false. All effort to bring it back to itself and to see it in its absolute independence has the effect of suppressing it, of destroying it. In short, its exclusive affirmation has the effect of negating it immediately. It is also true that in negating itself, in the process of opposing to itself its opposite, it suppresses itself only in appearance; rather it affirms itself and is realized through its negation in a superior unity of which itself and its opposite are only stages." [6]

To understand Hegel, let us take the simplest and most abstract idea — the idea of pure and indeterminate being, apart from all quality. Such an idea is just as much that of non-being as of being, because being, so conceived, is only everything because it is only nothing. To affirm being, so conceived, is to affirm at the same time non-being. The absolute opposition of being and of non-being does not then exist in reality. We cannot, in fact, separate them without either one or the other disappearing, and logical thought is not satisfied by an identification of them. The reality of being, as of non-being, is found only in their synthesis, which makes their unity, that is to say, in becoming — the synthesis of these two contraries.

"So it is in all the steps of logic and of evolution. Every idea — accordingly everything taken in itself — implies its own negation. Its truth and its intelligibility are found again only in a new category, which contains at one and the same time the affirmation and the negation of the thing in question, and realizes their immediate unity. But this unity cannot be itself conceived of or considered in an isolated state. It will be necessary to act in respect to it

[6] Noël, La logique de Hegel, 1897, pp. 7 and 8.

as in the case of the first term, and, from unity to unity, reascend in this way from a superior affirmation to a still more superior affirmation, until the absolute idea is arrived at, in a category where all the oppositions shall have been reconciled — resulting in the unity of all the anterior categories." [7]

"Reason always proceeds in this way to the absolute idea; presenting, opposing, conciliating. Everything exists under three successive forms: in itself, it is the thesis; in opposition with itself, for itself, it is the antithesis; in itself and for itself, it is the synthesis. Such is the eternal rhythm of the evolution of thought and of the world." [8]

So, as we have said before, being is the thesis; non-being, the antithesis; coming into being, becoming, is the synthesis. Being and non-being do not exist; they destroy each other. Reality is simply a coming into being. The general is the thesis; the particular, the antithesis. The general and the particular negate each other reciprocally. They realize themselves in the synthesis, which is the individual. In the philosophy of nature, the structure is the thesis; the dynamism, the antithesis. They rest upon a conception, one and synthetic: the theological conception. In the philosophy of mind the thesis and the antithesis are the body and the soul, which are unified in the human synthesis: the mind. Finally, when we consider the human being, the individual is the thesis whose antithesis is civil society. A civil society and the individual are inconsistent with each other. In considering the individual, we negate civil society; in considering the civil society, we deny the existence of the individual. But the two opposites are unified and harmonized in that powerful synthesis, the State. And in this we discover the basis of Hegel's philosophy of right and of the State. To say that the individual and society are direct opposites, negating each other reciprocally, but that they are unified, are realized in synthesising themselves in the State, is to say that the human individuality is only a reality in and through the State. If this is so, the omnipotence of the State cannot infringe the right of the individual any more than it can interfere with civil society because the reality of the individual and of civil society will be all the greater the more powerful the State becomes. It is expressing, in terminology properly Hegelian, an idea identical

[7] Archambault, Hegel, 1912, p. 18. [8] Archambault, *ibid.*

with that which we have already found in the doctrines of J. J. Rousseau and of Kant.

II

From logic Hegel passes to nature. "If the idea is put as nature, it is by virtue of the same general law which governs each phase of the idea itself. It maintains with nature a relation very similar to that which each category maintains in itself with reference to the category following it. Nature is thought externalizing itself, mediatizing itself. But such a state could never be definitive. Through its necessary dispersion and dissemination, nature tends to come back to unity, which is equally necessary, and this unity is subjectivity. And its evolution seems to Hegel to be like a progressive concentration at a center, where it becomes subjective and idealizes itself — just another stage in its ascension toward absolute mind (*l'esprit*). These evolutionary stages are intimately allied with one another. But their succession is not a true genesis, such as materialism imagines, or at least it is in the idea that the generating principle exists. It is through the idea alone that there is progress. . . . The movement of nature toward absolute mind is made up of three phases: mechanical, physical, and organic. Everything happens, as in logic, by thesis, antithesis, and synthesis." [9]

The philosophy of nature brings up the problem of death. For Hegel, death is the disappearance of the individual; it is the progression of the species. Now as the species is the general, the idea, thought which is universal being, conscious of itself and eternal, progresses with the species. The end of nature is to destroy itself as an assemblage of human individuals, to lift itself above immediate and sensible existence, to burn itself up like the phoenix, and be born again radiant as a spirit. Mind is not a product of nature; it is the metaphysical principle of its development. The history of the world is the history of the enfranchisement of the mind and of the world in the mind. The mind, which is conscious of itself, wants to give itself conscious expression through nature, and to return unto itself. This reconciliation of the mind with nature is its only true deliverance and its only redemption. This deliverance of mind from the encumbrance of matter, and of its

[9] Archambault, Hegel, 1912, pp. 24 and 25.

necessity, is the idea behind the philosophy of nature. "The end of these teachings," writes Hegel, "was to give an idea of nature and to force this Proteus to reveal himself in his true form, to find in the whole world the image of ourselves, to have seen in nature the true reflection of mind — in short, to recognize God, not in the innermost contemplation of the mind, but in its immediate and sensible existence." [10]

We can comprehend by this statement the transition from the philosophy of nature to the philosophy of spirit. "Spirit is the notion (*la pensée*) returning unto itself, after having denied the existence of itself and externalized itself in matter, in order to find once more with consciousness of itself, the liberty essential to its nature. But no more for spirit than for anything else could there be a possibility of immediate total realization. It succeeds in determining itself freely only at the close of a long development during which it was dreaming these three successive thoughts: subjective spirit (*l'esprit subjectif*) under the form of a relation with itself, where the ideal totality of the idea realizes itself only for itself; objective spirit (*l'esprit objectif*) under the form of reality, inasmuch as it ought to produce, and that it has produced; absolute spirit (*l'esprit absolut*), unity in itself and for itself, unity of the subject and of the object." [11]

Subjective spirit obeying the universal law realizes itself in itself under an immediate form; it is then the soul (*l'âme*) — a soul which is without doubt immaterial, but is still connected with the earthly substance. Through sensation (*le sentiment*) the soul individualizes itself and in distinguishing itself from particular sensations (*les sentiments*), at the same time from its body, it becomes real. Subjective spirit by virtue of that act assumes the character of its very self, under mediate form; this is consciousness (*la conscience*). Consciousness, therefore, evolves itself. It develops itself in consciousness within itself, and finally this develops into reason — a faculty through which the mind recognizes itself as substance and absolute truth.

Subjective spirit exists then in itself, and is object for itself, as spirit properly so called. This is the subject matter of psychology,

[10] Archambault, p. 27.

[11] Archambault, pp. 27 and 28. [In translating these terms as "objective spirit" and "subjective spirit," I have followed Baillie's translation of Hegel's Philosophy of Mind, II, 429. — Translator.]

according to which the mind is considered as theoretic, then as practical, and finally as free.

Free will is the unity of the theoretic and practical mind, of thought and of free will. The mind is free when it recognizes that it creates everything and wills everything that it creates. Free will is a moment of liberty, but it is not entire liberty. "I am free when I will what is rational, and when I act, not according to my individuality, but according to the notion (*la notion*) of morality and of reason. There is only contradiction between liberty and necessity from the abstract point of view of understanding: liberty and necessity confound each other in the concrete affirmation of the mind." [12]

III

Objective spirit (*l'esprit objectif*) manifests itself under the form of right, which is liberty guaranteed to all. From what precedes we have come to see the place the Hegelian doctrine of right occupies in the whole system of his philosophy. That is why the explanation that has just been given was necessary.

"The territory of right," writes Hegel, "is in general the spiritual, and its more definite place and origin is the will which is free. Thus freedom constitutes the substance and essential character of the will, and the system of right is the kingdom of actualized freedom. It is the world of spirit produced out of itself as a second nature." [13]

We have seen before, in fact, that in the Hegelian scheme nature is only the externalizing of mind. Then mind, in so far as as it is free will externalizing itself, is right and law (*le droit*).

Following the passage which has just been quoted, Hegel gives an extensive analysis of will, which need not be summarized here. But it is important to note that he affirms over and over again, in divers ways, that the very essence of right is free will. Here is a literal translation of a passage which seems in that respect the most characteristic: "Right is essentially the essence of free will. It is thus, above all, liberty as idea. . . . Right in general is something sacred, and this only because it is the essence of the absolute notion of liberty, conscious of itself." [14]

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[12] Archambault, pp. 28 and 29.

[13] Hegel, Grundlinien der Philosophie des Rechts, Vol. VIII, German edition of his complete works, 1833, p. 34. [I have used Dyde's translation, Hegel's Philosophy of Right, p. 10. — Translator.]

[14] Hegel, *l. c.* pp. 63 and 64. [The original reads: " Diess, das ein Daseyn überhaupt,

Hegel criticizes even the generally admitted Kantian definition of right according to which "the principal element of right is found in the limitation upon my liberty, upon my free action (*Willkür*) of such a nature that it can co-ordinate itself with the liberty of all in accordance with a general law." This definition, says Hegel, contains, on one hand, only a negative determination, that of limitation; and on the other hand, the positive element of this definition, namely, the conciliation of the will of one individual with that of others, ends in formal recognized identity and in the principle of contradiction. Hegel adds that this conception of right, which is at least incomplete, is due to the influence of J. J. Rousseau. [15]

Will, the essential element of right, like all the elements of material nature, exists under three successive forms. (1) Will in itself; the general and abstract will, that is determined abstractly by the ends which a definite subject pursues. (2) Will for itself; that is to say, a particular will manifesting itself in the pursuit of a particular end. Will in itself is the thesis. Will for itself is the antithesis. (3) The synthesis is found in the will in itself and the will for itself, which is the will of a determinate individual. "Will," writes Hegel, "becomes through this the individual will — the person." [16]

Here should be stated just how Hegel arrives at the notion of person, that is to say, at the notion of a free will existing in an individual. "In personality," says he, "there is what I am, as such, bounded and determined completely and on all sides, and at the same time in a relation simply with myself; and in my finitude, I know myself as infinite, universal and free." [17]

Personality essentially includes juridical capacity (*Rechtsfähigskeit*) and "forms the notion and the abstract basis even of abstract right, and consequently of formal right. The fundamental precept of right, therefore, is this: Be a person and respect others as such." [18]

Daseyn des freien Willens ist, ist das Recht. Es ist somit überhaupt die Freiheit als Idee. . . . Das Recht ist etwas Heiliges überhaupt allein weil es das Daseyn des absoluten Begriffes, des selbstbewussten Freiheit ist." Grundlinien, 2 ed., 62–63. — Translator.]

[15] Hegel, *l. c.* p. 64.

[16] Hegel, *l. c.* p. 73.

[17] *Ibid.*

[18] *l. c.* p. 75.

IV

This free will of a person asserting itself, as such, produces, according to Hegel, three results: First, possession, which is ownership. The liberty here is that of the abstract will. That is to say, the will of a person does not enter here into relation with that of another person, but only into relation with itself.

Second, contract: the person detaches himself from himself and enters into relation with another person; and certainly, such two persons are just like owners with regard to each other. Their identity, existing in itself, becomes realized through a transfer of property from one to the other, by the will common to both, and resulting in the conservation of their rights.

Third, non-right (*Unrecht*) and transgression.[19] They appear when thought manifests itself in its relations with itself, not distinct and apart from another person, but distinct from itself; when thought manifests itself as a particular will distinct and separate from itself, inasmuch as it is will in itself and for itself. In other words, transgression, non-right, is the will of the person revolting against itself to the extent that it is will in itself and for itself.[20]

These three elements constitute abstract right to which Hegel opposes subjective right, which corresponds to what is called in current terminology, morality.

Subjective right or morality (*Moralität*) is opposed to abstract right, inasmuch as the internal state of the subject and the intention — which in abstract right do not intervene or intervene only secondarily — are here wholly of the first importance.

Subjectivity appears when we consider the individual and the efforts which he makes in order that this particular will — which is the will of itself — may coincide with the general will — the will in itself — so that an individual will may be formed which is will both in and for itself. For Hegel, in fact, moral good is the identification of particular wills with the general will. This identification appears as a duty, because it is not produced spontaneously and immediately; and is constantly opposed by tendencies, passions of man, and all other disturbing causes.

If good is the identification of particular wills with the general

[19] [*Verbrechen*. Dyde (p. 47) translates it "crime." — Translator.]

[20] Hegel, *l. c.* p. 76.

will, evil is the conflict of these particular wills with the general will; and the duty always exists of avoiding this conflict and of striving for this identification.

How does this synthesis of the general will and of particular wills realize itself? The answer is by diverse institutions which are in their order of development the family, civil society, and the State. This realization of the moral idea in action (*dans les faits*) is what Hegel calls *Sittlichkeit*, practical morality, morality realized or on the way toward realization.

The philosopher develops this conception on page 207 of his Philosophy of Right (*La Philosophie du droit*, volume eight of his complete works) in language singularly obscure and almost impossible to translate into French, the conclusion of which, however, must be quoted in full: "And so," writes Hegel, "the concrete identity of the good and of subjective will, the truth of this identity — this is morality realized (*Sittlichkeit*)." Let us not forget this formula because his whole theory of the State grows out of it.

The philosopher's idea is given precisely in the following passage: "In this identity of the general will and of the particular will right and duty coincide; and man has through morality realized (*durch das Sittliche*) rights so far as he has duties, and duties so far as he has rights. In abstract right I have the right and another has the corresponding duty; in abstract morality (*im Moralischen*) the right of my own knowing and willing, as well as of my welfare, must be objective and unified with the duties." [21]

V

How is the moral idea or subjective right realized? By the following three elements which overlap each other in a progressive order: the family, civil society, and the State.

The State is the superior realization of the moral idea. This is the way Hegel explains the family, civil society, and the State as modes of realization of the moral idea:

"Customary morality (*Sittliche*), so far as it is coextensive with the true notion, — individual conscience existing for itself, — is the real mind or spirit (*der wirkliche Geist*) of a family and of a people. What is moral (*das Sittliche*) is not abstract, as the good,

[21] Hegel, *l. c.* p. 220.

but real in an intensive sense. The spirit or mind (*l'esprit*) has reality, and individuals are the accidents of it. Concerning the moral (*beim Sittlichen*) there are always only two points of view possible: either we start from substantiality, or we proceed atomically, beginning with individuality as the basis. The latter point of view excludes the spirit (*ist Geistlos*), because it leads only to a synthesis; spirit is nothing individual, but the union of the individual and of the general. The notion of this idea, to the extent that it is spirit (or mind), knowing itself and real, is a progression by means of its elements, but only when it is the objectivation of itself. It is thus at first the moral spirit (*sittliche*) immediate and natural: the family. This substantiality loses its unity, breaks up, and assumes a state of relativity known as civil society — a union of the members of so many autonomous individuals thus formed into a generality in accordance with their needs and by means of the juridical constitution, as means of security of the person and of property, and by an internal regulation of their general and particular interests. This external state outwardly shows concentration toward morality and a substantial generality as ends, as well as toward public life, which is consecrated to it, in the constitution of the State." [22]

Hegel devotes many pages to the development of his ideas concerning the family.[23] To understand them, one must always go back to the conception of the identity of opposites, which is the key to Hegelian philosophy. The two opposites are the individual and the group. The individual, in relation to the group, exists in himself. The group, in relation to the individual, exists for itself. The immediate and natural synthesis of the individual and of the group is the family, which exists in itself and for itself. It is immediate, because this synthesis forms itself simply and naturally — because it is love, the result of the natural attraction of human beings.

In the family the individual has the sentiment (*le sentiment*) that he is not a person for himself, but that he is part of a group of which he is a member, that he is co-operating in something which exists in and for itself. The family, founded on love, is therefore the natural synthesis of the individual and of the group.

"Love," says Hegel, "is the sentiment of my union with an-

[22] Hegel, *l. c.* pp. 220 and 221.

[23] Hegel, *l. c.* pp. 221 to 246.

other, the realization that I am not isolated but that I acquire my consciousness only through renunciation of my will to exist for myself. Looking upon myself in this way, I understand my union with another and the union of another with me. The first element of love is that I do not will to be an autonomous person existing for myself; and that if I were, I should have a sense of incompleteness, of imperfection. The second element of love is that I ennoble myself in another person; that I gain through that person, and that, in return, the other person so gains through me. Love is, accordingly, this strange contradiction which intelligence cannot solve; but, knowing that there is nothing stronger than this punctiliousness (*Punktualität*) of the consciousness itself, even though denied, I must therefore accept it as affirmative (*affirmativ*). Love solves the contradiction; so far as it solves it, there is moral unity." [24]

If an understanding of this curious passage is possible, it may be summarized thus: Love is the perception of my intimate union with another — a profound contradiction since through love the individual denies himself. But love itself solves the contradiction which it creates; it solves it because it founds the family, the natural group, the principle of practical morality (*Sittlichkeit*).

In the family, therefore, the individual conserves rights. But these rights do not appear in the unity of the family; they manifest themselves only when the family is dissolved: rights over the patrimony, rights to sustenance, rights to education. As to the rights of the family, they consist in the maintenance of its *substantiality*, that is to say, the maintenance of its unity against all causes which might destroy and compromise it, and against the subjective sentiment — let us say egoistical sentiment — which rises against love, that is, against the principle of the unity of the family.

"A right belongs to the individual on the basis of the family. What this right is, what the right of the individual is in this unity of the family, appears only after the family has just been dissolved and when those who must be members of it appear as autonomous persons. The right of the family consists essentially in that its *substantiality* must subsist; it is thus a right against externality, against the breaking of the unity. . . . Against love there is

[24] Hegel, *l. c.* p. 222.

a sentiment, a subjective one, but one which cannot exist before such unity." [25]

The family receives its complete development by means of three elements, namely: First, the form of its immediate notion as marriage; second, the external essence — property — the welfare of the family and its management; third, the education of the children and the dissolution of the family.[26]

It is impossible for us to follow the philosopher in his extensive treatment devoted to these different points. Let us only note that in regard to marriage Hegel declares that it does not simply rest on the will and the sentiment of those who enter into the contract. It must have for its basis reason; for its end, the child; and, beyond that, the furtherance of the ends of the State. These circumstances distinguish it from concubinage. Hegel declares himself also as firmly opposed to divorce. This is logical, since the family is an element in the realization of morality, and its right tends to set aside all causes likely to bring about its dissolution and compromise its unity. Divorce must be possible only in wholly exceptional cases and by sufferance merely.

VI

In discussing civil society, Hegel has in view especially human societies in their modern form in the countries called civilized, that is in modern nations.

A people, a nation, is either a family enlarged, and then it has a natural origin, or else it is the union of family communities, which, having lived apart and independent up to a certain time, have been united either by a power of domination or through themselves voluntarily, and determined by the desire of assuring the realization of their respective action and of their needs.

The concrete person is the principle of civil society; it is the individual, concretely, who is a particular end for himself, who is a collection of needs, who is a combination of necessity and of liberty. But it is the concrete person, so far as he is in relation with other particular persons. It is then that the principle of community appears which is realized and satisfied in the formation of civil society.

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[25] Hegel, *l. c.* p. 222.

[26] Hegel, *l. c.* p. 223.

But let us understand that in the philosophy of Hegel, civil society is not yet the State. It is simply a grouping of individuals that has been formed for the satisfaction of particular needs and the protection of particular interests. Let us not believe, moreover, that Hegel thought that the State had superposed itself on civil society. Civil society is the difference between the family and the State. The formation of civil society is brought about more slowly than that of the State. In that it is a realm of difference it implies the State which it ought to have as a proper element beforehand in order to exist. It is by way of abstraction that we must represent civil society as distinct from the State. When we represent the State simply as a unity of different persons, as a unity which is only an aggregate, we have then the determination of civil society.

In civil society each is an end in himself. Every other end is nil so far as he is concerned. But without his relation with others each cannot attain the aggregate of his ends. Hence for each individual, others are the means of attaining his ends. The end of each thus being conditioned in its realization by the community founds a system of reciprocal dependencies in such a way that the subsistence and the purposes of the individual and the end and the right of others are interrelated — are founded on this interdependence, and are real and guaranteed only through this interdependence.

We may consider this system as being the external State, the State of need and of intelligence (*Noth- und Verstandes-Staat*).[27]

Civil society is made up of the following three elements:

First, the realization of need and the satisfaction of the individual through his work and through the work and satisfaction of the needs of all the others. This is the system of needs.

Second, the realization of the general element of freedom contained therein, the protection of property by the administration of right.

Third, provision against the risk persisting in this system, and the carrying out of the particular interest as being a common interest, by means of government (*la police*) and the corporate body.[28]

In civil society right (*droit*) appears to be confounded with rule

[27] Hegel, *l. c.* p. 247.

[28] Hegel, *l. c.* p. 254.

of law (*loi*), that is, with positive law (*droit*), whether this law (*droit*) is written or whether it is simply customary. All beings and all things are in submission to laws (*lois*); but man only is conscious of it. In human societies these laws (*lois*) are founded upon the three elements of which societies are composed and they govern these elements, that is, the system of needs, the administration of right (*droit*), and government (*la police*).

In Hegel's doctrine the system of needs is something wholly similar to the social solidarity or social interdependence of contemporary sociologists. But the idea which the latter express in very simple and clear language is set forth by Hegel in terms singularly obscure. This can be seen by glancing at the beginning of the chapter entitled *The Theory of Needs:* "The particular, in so far as it is the determinate opposite of the general will, is a subjective need, which obtains its objectivity, that is, its satisfaction, first, by means of exterior things, which are now also the property and the product of other needs and wills; and second by activity and work, in so far as the element producing the two things is realized. While its end is the satisfaction of the subjective particularity — the generality being realized through relations with the needs and the free will of others — the appearance of *rationality* is, within this finite sphere of intelligence, the element by which it enters into consideration, and which even effects the conciliation within this sphere." In simple language does this amount to saying more than that individuals have needs and that they realize that they can obtain satisfaction of them only through social life and through the exchange of services due to work and to the activity of each? It is not at all for that matter unlike what Hegel expresses again in the following passage:

"Animals have a limited circle of needs, with means equally limited for the satisfaction of them. Man shows in this dependence the possibility of surpassing them in his generality (whatever of the general there may be in him), first by the complexity of his needs and of the means of satisfying them and then by the classification and the distinguishing of concrete needs in their various parts and individual elements, which become thereby particularized needs and consequently more abstract." [29]

The work of all produces the common patrimony; but each has

[29] Hegel, *l. c.* p. 256.

his part of this common patrimony, since the activity of each contributes to create it. The egoism of the individual turns to the collective profit; in return, the individual profits from the collective work. The sociological conception of social solidarity is what the philosopher is continually expressing, but it is more clearly set forth in the following passage than the two previously quoted: "In this dependence and in the reciprocity both in regard to work and the satisfaction of needs, subjective egoism turns to the satisfaction of the needs of all the others, to the realization of the particular by the general as a logical progression, so well that, while each acquires for himself — creates and profits thereby — he also produces and acquires for the benefit of all. This necessity, which resides in the complex interlacing and interdependence of all, is for each the general patrimony, the permanent patrimony, which, by its formation and by its end, contains the possibility for each of taking part therein, so as to be sure of his subsistence in the same way that this acquisition, realized by his effort, maintains and increases the general patrimony." [30]

VII

This theory of needs, which is, as it were, the constitutive element of civil society, is the foundation upon which rests the positive right (*droit*) of such society; and it is this right (*droit*) which at the same time secures to each individual the guarantee of his participation in the common patrimony. Each one works for the collectivity; each one can legitimately profit from the product created by the collective effort; and it is the positive right (*droit*) of society that effectually guarantees to each person such participation. Hegel expresses this idea well when he writes: "The principle of this system of needs has, like the particularity of knowing and of willing, generality existing in itself and for itself — the generality of liberty; but only abstractly, and thus only as a right to property in itself, which here is no longer in itself, but in its reality holds good as protection of property by the administration of right." [31]

The reciprocal relation of needs and of effort is a relative element; but it is reflected first in itself — principally in indefinite per-

[30] Hegel, *l. c.* p. 262.

[31] Hegel, *l. c.* p. 270.

sonality, in abstract right. "It is this sphere of the relative taking shape, so to speak, which gives to right the character by which it may be recognized, conceived and willed as general and permits it, being so conceived and willed, to have a value and an objective reality." [32]

Hegel defines this objective reality of right in these terms: "The objective reality of right consists not only of what it is — especially of what it becomes — conceived by the mind, but also consists both of the capability of being realized and of having value. Accordingly it comes, by virtue of this, to be conceived as having general value." [33]

From this notion of right we naturally and logically pass to the notion of rule of law (*loi*), which is the very foundation of positive right (*du droit positif*): "What is right and law (*le droit*) in itself is established in its objective essence, that is to say, determined by thought for consciousness, and conceived as being that which is and has value as right. Such is the law (*la loi*); and by this determination right (*le droit*) specially is positive right." [34]

The rule of law (*loi*) then does not create right (*droit*); but it gives it its generality and its true character: "In order to understand what it is to legislate, one must have before oneself not only this element by which the rule of conduct is expressed, and which is valid for all, but especially this internal element, equally essential, namely: the knowledge of its content in its determinate generality." [35]

This leads the philosopher to determine what is custom and the difference between written law and common law. "Only men," says he, "have customary laws — for animals have no law other than their instinct — which contain this element of being, and of becoming, conceived as thought. They differ from the written laws in that they become conceived in a subjective and contingent manner; they are consequently more indeterminate as regards themselves, and more obscure because of their generality of thought. Besides, knowledge of right (*du droit*) in both senses is chiefly a contingent possession, is a lesser thing." [36]

Let us not say that customary laws tend more to be violated than written laws, since in practice laws in a nation do not cease

[32] Hegel, *l. c.* p. 170.
[33] *Ibid.*
[34] Hegel, *l. c.* p. 271.
[35] *Ibid.*
[36] Hegel, *l. c.* p. 272.

to be customary laws from the fact that they are written and compiled. Let us not pretend, moreover, to refuse to modern peoples the vocation of legislating. This would be a jest — a grave error. Such refusal would deny to individuals the aptitude of grouping in a logical synthesis the mass of existing laws, when, on the contrary, the spirit of systematizing is characteristic of the modern epoch.

But what element is it which gives to law its obligatory force? It is the identity of that which is in itself (*Ansichsein*) and that which is law (*Gesetzsein*). "Through this identity of the abstract or implicit with what is actually constituted," says Hegel, "only that right is binding which has become law. But since to constitute a thing is to give it outer reality, there may creep into the process a contingency due to self-will and other elements of particularity. Hence the actual law may be different from what is in itself right." [37]

When right appears in the form of law, it appears according to its content as applying itself to the substance of relations, individualizing itself and developing infinitely in civil society in the forms of property and contract, and also as applying itself to relations resting upon sentiment, love and trust, but only in so far as these relations contain the elements of abstract right. The moral elements and the moral limitations which concern the will in its most intimate subjectivity and particularity cannot be the object of positive legislation.

Besides this application to particulars, right (*droit*) formulated into law (*loi*) applies to individual cases in themselves. It is in this extension of the general, not only to the particular, but also to the individual — that is to say, in its immediate application — that the positive element of the law specially consists.

That is not all. Another transformation takes place in civil society. Just the same, in fact, as in civil society right (*droit*) in itself becomes law (*loi*), so the immediate and abstract existence of my individual right becomes recognized as an element of the general will and of the general conscience. Acquisitions and acts in respect to property ought to take place in the form which gives them this character. Property rests now on contract and on forms

[37] Hegel, *l. c.* pp. 274 and 275. [I have used Dyde's translation here, p. 209. — Translator.]

which render it susceptible of being proved and of giving it legal efficacy.

And so personality and property come to have a legal value in civil society. At the same time, transgression ceases to be the wrong of an indeterminate subjective; it becomes the wrong of the general body which possesses in itself a firm and well-established existence. This shows the danger to society in transgression. If the internal gravity of such violations increases, then the power of the social group becomes surer of itself; the external gravity of the wrong diminishes, and there appears a greater leniency in its repression.[38]

Hegel is thus brought to determine the rôle which public power plays when it intervenes as judge, or in other words, the juridical character of the act of the tribunal. It may thus be stated in a few words: "Right (*droit*) appearing to be such in the form of law (*loi*) is right (*droit*) for itself (*Fürsich*); it is opposed in itself to the particular will and to the individual idea of right (*droit*). It is general. The recognition of this, and this development of right (*droit*) in the particular case, without having the objective sentiment of particular interest intervene, becomes part of the duties of the public power — the administration of justice (*la juris-diction*)." [39]

The philosopher might have said so in simpler and clearer terms as follows: The rôle of the judge consists in applying to particular cases the general rule as formulated in the law, and this is done by making an abstraction of the particular interest.

All the members of civil society have the right of going before the tribunals to have such tribunals adjudicate the application of the law to the particular cases which interest them. In the same way, all the members of civil society are in duty bound to go before the tribunals, and if a contest arises in regard to their rights, they must accept as their rights what is laid down by the tribunals. In civil society — and that is its peculiar characteristic — no one can take the law into his own hands.

If there is an infraction of the law, the injured party has no right to vengeance. "The right against infraction of the law in the form of vengeance is only right in itself (*Recht ansich*) not juridical in form (*Nicht in der form Rechtens*), that is to say, not juridical

[38] Hegel, *l. c.* pp. 283 and 284. [39] Hegel, *l. c.* p. 285.

with respect to its existence. In place of the injured party the element of injury to the group intervenes, becoming real through the tribunals, which undertake the pursuit and punishment of the wrongdoer for the breach. The punishment ceases thereby to be a subjective and contingent vengeance, and by the precise coincidence of right with itself, becomes a penalty." [40]

Thus through right (*droit*), civil society appears to us as the synthesis of the general and the particular which is realized in the individual. "By administration of justice civil society, in which the idea is lost in particularity and is decomposed in the separation of the internal and the external, brings itself back to its notion, that is to the unity of the intrinsic universal with the subjective particularity; the one in the individual case and the other in the signification of abstract right." [41]

Two other elements of civil society are present to perfect the realization of this synthesis: they are government (*la police*) and the corporate body. "The realization of this relative unity over the whole range of particularity is the function of government (*la police*), and within a limited but concrete totality constitutes the corporate body." [42]

Government (*la police*) and the corporate body come into civil society to complete the rôle of the administration of justice. They protect the personality and the property of the individual against accidents, which are always possible. The idea in itself has nothing original in it; but it is expressed by Hegel in phraseology worth quoting, which is in accord with the dominant conception in his philosophy — the synthesis of the particular and of the general realized by civil society.

He writes: "In the system of needs the subsistence and happiness of every individual is a possibility, whose realization is conditioned by the objective system of needs. But the right which is actualized in the individual contains the two following factors. It asks first that his person and property should be secured by the removal of all fortuitous hindrances, and second that the security of the individual's subsistence and happiness, his particular well-being, should be regarded and actualized as right." [43]

[40] Hegel, *l. c.* pp. 285 and 286. [41] Hegel, *l. c.* p. 292.

[42] Hegel, *l. c.* p. 293. [I have used Dyde's translation here, p. 224. — Translator.]

[43] Hegel, *l. c.* pp. 294 and 295. [I have used Dyde, p. 225. — Translator.]

This synthesis of the particular and of the general, realized through government (*la police*) in civil society, appears again in the passage in which Hegel thus sums up the rôle of government: "The universal which is contained in the particularity of civil society is realized and preserved by the external system of governmental administration, whose purpose is simply to protect and to secure the multitude of private ends and interests subsisting within it. It has also the higher function of caring for the interests which lead out beyond civil society." [44]

Finally, we have seen that civil society is one of the modes of realization of morality, just as the family and the State, though in a lesser degree. It is by means of the corporate body that morality realized appears in civil society, — by means of the corporate body, that is to say, of the grouping of individuals according to their rôle in society, of the formation of social classes which take the middle ground between the family and civil society. "The middle or commercial class (*Stand des Gewerbes*)," says Hegel, "is essentially engaged with the particular, and hence its peculiar province is the corporate body." [45]

It is through the corporate body that morality realized finds its place in civil society and it does so in this way: "In accordance with the idea, particularity itself makes the universal, which exists in its special interests, the end and object of its will and endeavor. Morality realized (*Sittlichkeit*) thus comes back as a constituent element of civil society. This is the corporate body." [46]

The corporate body forms with the family in civil society the very foundation of the State. The State, that powerful and complete synthesis of the general and of the particular, realizes in its fulness the moral and divine on earth.

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[44] Hegel. *l. c.* pp. 306 and 307. [I have used Dyde, p. 235. — Translator.]
[45] Hegel, *l. c.* p. 307. [Dyde, p. 235. — Translator.]
[46] Hegel, *l. c.* p. 307. [Dyde, p. 235. — Translator.]

CHAPTER V

HEGEL'S POLITICAL PHILOSOPHY — THE STATE

IN Hegel's *Philosophy of Mind* may be found the following: "The essence of the State is the universal, self-originated and self-developed, — the reasonable spirit of will; but, as self-knowing and self-actualizing, sheer subjectivity, and — as an actuality — one individual. Its work generally — in relation to the extreme of individuality as the multitude of individuals — consists in a double function. First it maintains them as persons, thus making right a necessary actuality, then it promotes their welfare, which each originally takes care of for himself, but which has a thoroughly general side; it protects the family and guides civil society. Secondly, it carries back both, and the whole disposition and action of the individual — whose tendency is to become a center of his own — into the life of the universal substance; and, in this direction, as a free power it interferes with those subordinate spheres and retains them in substantial immanence." [1]

A résumé of Hegel's whole doctrine concerning the State is found in these few lines.

I

The State brings the family and civil society as well as the will and the activity of the individual again into substantial existence and thus, by its unrestricted power, breaks up the subordinate spheres in order to keep them in inherent and substantial unity. The synthesis of the general and the particular, then, the fusion of the particular in the one and general substance, is precisely the realization of morality. Accordingly, the State by its very definition is the reality of the moral idea. "*Der Staat ist die Wirklichkeit der sittlichen Idee.*" [2]

Hegel, taking up and developing the idea expressed in the passage in the *Philosophy of Mind* previously quoted, and summarized in

[1] Hegel, Philosophie de l'esprit. Vera's translation, II, p. 379. [I have used Wallace's translation, Hegel's Philosophy of Mind, p. 263. — Translator.]

[2] Hegel, Grundlinien der philosophie des Recht, Vol. VIII of the complete works of 1883, p. 312.

the proposition just cited, writes also as follows: "The State is the moral spirit (*sittlichen Geist*) as the will which manifests itself, makes itself clear and visible, substantiates itself. It is the will which thinks and knows itself and carries out what it knows and in so far as it knows. The State finds in ethical custom its direct and unreflected existence, and its indirect and reflected existence in the self-consciousness of the individual and in his knowledge and activity." [3]

Thus, by means of the State, the moral idea finds its complete realization. The State exists immediately in itself. Mediately, it exists through individuals, but the individuals have their substantial liberty only through the State. The individual is free only in the State because it is only by the State and only in the State that his will is fused with the general will.

This is the fundamental notion underlying the Hegelian doctrine of the State, the notion which is the upshot of his philosophical system and is the starting point of his political doctrine. For the latter is no more than the development of the former. Let us not think, however, that this conception of Hegel's is entirely new. It was already expressed in Rousseau's *Contrat Social* in less abstract and less philosophical but certainly clearer terms. Rousseau had said in fact: "In order that the social pact shall not be a vain formulary, it tacitly contains this agreement which alone can give force to the others, — that whoever shall refuse to obey the general will shall be constrained to it by the whole body: which means nothing else, except that he will be forced to be free." [4] Hegel talks of the rational in itself and for itself, of the realization of morality by the State. The idea is really the same. The end is also the same, namely, to deceive him into believing he is free when in fact he is subservient to the omnipotence of the State, and to make him even believe that the more powerful the State the freer he is.

II

If the State is the realization of the moral idea, it is at the same time the rational in itself and for itself, "inasmuch as it is the

[3] Hegel, Grundlinien der philosophie des Recht, Vol. VIII of the complete works of 1883, p. 312. [I have followed Dyde, p. 240. — Translator.]

[4] Contrat social, bk. I, chap. VII.

realized substantive will, having its reality in the particular self-consciousness raised to the plane of the universal." [5]

The State being thus understood, the question of the powers of the State in regard to the individual need not be asked, because it is within and by means of the State that the individual obtains the greatest amount of liberty. Hegel in fact writes thus: "This substantial unity of the State is its own motive and absolute end. In this end freedom reaches its highest right just as this ultimate end has a superior right over the individuals, whose first duty it is to be members of the State." [6]

This passage appears to be the best for an understanding of Hegel's theory. The State being the superior synthesis of the particular and of the general, it and it only can secure for the individual the realization of his rights. But at the same time such supreme right belongs to the State as against the individual because the supreme duty of the individual is the duty to be a member of the State.

Hegel does not wish any doubt whatever to arise about the meaning and import of his doctrine. He expressly rejects the French individualistic doctrine, formulated in the *Declaration of Rights* of 1789, and according to which the sole end of the State is to protect the liberty and the property of the individual, to assure the individual the guarantee of his natural rights in such a way that he will become a member of the State only voluntarily. Not at all, says Hegel. "The State is in a wholly different relation with the individual. As the State is the objective spirit (*l'esprit*)[7] the individual has his objectivity, his truth and his morality only because he is a member of the State." [8]

Wishing to express his thoughts in even more forceful language Hegel adds: "This idea is the eternal and necessary being of spirit, in and for itself." [9]

After such an affirmation is there reason for seeking the origin of the State and determining its legitimacy? Not at all. Since it is the eternal and necessary being of spirit, its existence is its

[5] Hegel, *l. c.* p. 313. [Dyde, p. 240. — Translator.]

[6] *Ibid.*

[7] *Cf. supra*, chap. IV, section III, as to Hegel's "Objective Spirit."

[8] Hegel, *l. c.* p. 313.

[9] Hegel, *l. c.* p. 314. [See Dyde, p. 241, Hegel, Grundlinien, 2 ed., p. 307. — Translator.]

own justification; and by the very fact that it exists, it is all that it should be. If the State is the realization of the moral idea, it is legitimate simply because it exists.

"What is the origin of the State," writes Hegel, "or rather of a determinate State, of its rights, and of its determinations? Has it had for its origin patriarchal relations, violence, or contract? Does it flow from a corporate body? Have its rights been established in consciousness by custom, by positive or divine law, or by contract? That has nothing to do with the idea of the State. When we are dealing with the science of the State these things are mere appearances and belong to history. . . . Philosophical doctrine considers only what is within, that is to say, ideas." [10]

Hegel does not ignore, however, the doctrine of Jean Jacques Rousseau. There is, says he, in this doctrine a great deal of truth, but it is incomplete and it has not got to the bottom of things. "Jean Jacques Rousseau," writes Hegel, "has the merit of having expressly made the will the fundamental principle of the State, a principle which is not only formal like the social instinct or divine authority, but is also in its content thought, indeed is thought itself. But Jean Jacques Rousseau placed will, as Fichte does later, in a determinate form of individual willing, and considered the general will, not as the rational part of the willing in itself and for itself, but only as the collective will derived from the individual will through the union of individuals in the State and thereby becoming a contract which has for its conscious basis their free will and their voluntary concourse." [11]

This idea of a contractual union of individuals, a conscious and desired union, Hegel rejects vigorously. "There result from it, in fact," says he, "consequences which destroy the divine, existing in itself and for itself, and its absolute authority and its majesty." [12]

Hegel also rejects another mode of approach which is opposed to the rational conception of the State, namely, that which consists in considering the externality of phenomena, the contingency of wants, the intervention of force for protection, not as a moment in the historical development of a determinate State, but as the very substance of the State. For this reason our philosopher criticizes severely the work which the German publicist Haller had just

[10] *Ibid.* [11] *Ibid.* [12] Hegel, *l. c.* p. 315.

written under the title *Restauration der Staatswissenschaft*, in which he had attempted a truly realistic study of the State.

III

Let us thus put aside all the contingent elements of the State, let us disregard the different forms which the State in fact presents, let us reject all the doctrines which attempt to take into account these contingencies and these facts. They are without value. Let us consider the State in its intimate essence in the light of reason. Then alone can we understand its true nature, can we grasp its substantial reality, as in the following: "The State in itself and for itself is the moral whole (*Das sittliche Ganz*), the realization of liberty; and it is the absolute end of reason that freedom should be real. The State is the mind or spirit (*l'esprit*) which exists and is realized in the world as endowed with consciousness, while it is realized in nature only as the other of itself (*das andere seiner*), without consciousness, as sleeping spirit." [13]

If the State is the spirit (*l'esprit*), which in the world is conscious of itself, the State realizes becoming on earth, that is, the divine. There is thus in the State something divine; and this divine element is the very foundation of its unlimited power over individuals, who themselves find the realization of their moral being only in the politically divine (*divin étatique*).

Indeed, our philosopher expresses himself thus: "It is only in so far as it exists in consciousness, in so far as it is perceived as an existing object, that the spirit (*l'esprit*) is the State. For liberty we must not start from the individuality, nor from the individual consciousness, but only from the essence of consciousness; for whether man knows it or not, this essence is realized as an autonomous power, in which individuals are only moments. The State is the march of God in the world (*es ist der Gang Gottes in der Welt dass der Staat ist*). Its foundation is the power of reason, realized as will. To form an idea of the State, we must not have in mind particular States, or institutions, but consider thoroughly the Idea (*l'idée*), this real God." [14]

This divine character belongs to every State. We can find a good or a bad State, badly organized or well organized. Little

[13] Hegel, *l. c.* p. 319.

[14] Hegel, *l. c.* p. 320.

does it matter. If there be a State, there is always something divine about it. "Every State," writes Hegel, "which according to such principles as we have can be considered as bad, and in which we can recognize such and such faults, has always in itself — particularly when it is one of the States formed in our epoch — the essential elements of its activity in itself. Because it is easier to find a defect than to grasp the *affirmative*, we easily fall into this error of forgetting, with respect to certain particular ends, the immutable organism of the State. The State is not a work of art; it exists in the world; it is consequently in the sphere of free will, of contingency, and of error; bad enterprises can disfigure it in many ways. The most cowardly man, the criminal, the sick, the infirm, is nevertheless ever a living man; the *affirmative* is that life exists in spite of faults, and it is this *affirmative* which concerns us here." [15]

Consequently, the State can be bad, corrupt; it exists; it is subject to contingencies. But however bad, however corrupt it may be, it always retains the positive element of its being; it is always the realization of the moral idea; it is ever divine.

It goes without saying that with such a conception of the State there can be no question as to any limitation with reference to it. But at the same time the individual has nothing to fear from this unlimited power, because it is only through the State that he can realize the fullness of his moral being.

Hegel, for that matter, does not stop there. He proceeds to analyze the different elements contained in the idea of the State. They are three in number:

First, the idea of the State has an immediate reality, and the particular State, inasmuch as it is an organism, is in relation with itself. It is the constitution of the State, the internal public law (*le droit public interne*) or the internal law (*le droit interne*) of the State.

Second, the idea of the State is lost in the relation of the particular State with other States. It is the public external law (*le droit public externe*), the external law of the State.

Third and finally, the idea of the State is the general idea as species and absolute power in relation to individual States. It is the spirit (*l'esprit*) that finds its reality in the progress of the world's history.[16]

[15] *Ibid.*

[16] Hegel, *l. c.* pp. 320 and 321.

We must follow Hegel in his analysis of these three elements of the idea of the State.

IV

The philosopher first formulates this proposition: "The State is the realization of concrete liberty." [17] This means that the individual is free because he lives as a member of the State, and that he is free only because he is a member of the State. The internal organization of the State tends to realize this concrete liberty of the individual.

But what is this concrete liberty? Hegel defines it thus: "Concrete liberty consists in this: that therein personal individuality and its particular interests, as found in the family and civil society, have their complete development. In this concrete liberty, too, the rights of personal individuality receive adequate recognition. These interests and rights pass partly of their own accord into the interest of the universal. Partly also do the individuals recognize by their own knowledge and will, the universal as their own substantive spirit and work for it as their own end. Hence neither is the universal completed without the assistance of the particular interest, knowledge and will, nor, on the other hand, do individuals, or private persons, live merely for their own special concern. They regard the general end, and are in all their activities conscious of this end." [18]

Hegel says further: "The State as *moral*, as penetration of the substantive and of the particular, implies that my obligation to the substantive reality is at the same time the realization of my particular liberty; that is to say, that in it (the State) right and duty are united in a single relation." [19]

The philosopher expresses the same idea in still different terms: "The union of right and of duty has this double result that what the State requires as duty directly becomes also the right of the individual, since it is nothing more than the organization of the idea (*la notion*) of liberty. The determinations of the individual will receive from the State an objective existence and by such means arrive at their truth and at their realization. The State

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[17] Hegel, *l. c.* p. 321.

[18] Hegel, *l. c.* pp. 321, 322. [I have used Dyde, p. 248. — Translator.]

[19] Hegel, *l. c.* p. 323. [Dyde, p. 250. — Translator.]

is the unique means (indispensable) of attaining the particular end and welfare." [20]

These abstract and obscure formulas leave, however, no doubt as to Hegel's thought. To him only the State can realize the concrete liberty of man, because individuals do not have their complete personality without the State. Undoubtedly it is through individuals that the collectivity has consciousness and will. But, on the other hand, individuals are only really free when they recognize and desire the general interest as being their own substantial mind, and act for this interest as being their ultimate purpose.

Such is the State in its essence. Hegel thinks, however, that the modern State has most completely realized the synthesis of the particular and of the general, and consequently has come nearest to complete realization of the concrete liberty of man.

"The principle of the modern State," writes Hegel, "has this extraordinary strength and depth that it allows the principle of subjectivity to complete itself to an extreme of personal particularity and yet at the same time brings back into it substantial unity, which is thus maintained in itself. . . . The characteristic idea of the State in the modern epoch is that the State is the realization of liberty, not according to subjective liking, but according to the notion of willing, that is to say, its divinity." [21]

For the philosopher, therefore, the modern State has secured in the highest degree the liberty of the individual, because it has restored and maintained it in substantial unity, because it has founded it on the notion of the will, taken in its universality and its divinity. All this amounts to saying that the modern State has carried individual liberty to its highest point, because it has completely absorbed in itself the personality of the individual.

What is this modern State, then, which Hegel has particularly in mind? M. Lévy-Bruhl does not hesitate to answer that it is the Prussian State. He has us justly observe that Hegel passed the last thirteen years of his life in Berlin, admired and surrounded by his many disciples. "Hegel had found there," says M. Lévy-Bruhl, "the political atmosphere which suited him. In the opening lecture of his course, he stated that his text would be: Elective affinity, the original relationship of the Prussian State and of

[20] Hegel, *l. c.* pp. 326 and 327.

[21] Hegel, *l. c.* p. 322.

Hegelian philosophy. Hegel demonstrated it *a priori* and added to such demonstration an enthusiastic eulogy of Prussia and of the war against Napoleon." [22]

M. Lévy-Bruhl writes very aptly: "In Hegelianism, nothing conforms more to the Prussian tradition than the idea of the all-powerful State, anterior and superior to every particular interest and subordinating to itself the will and the personality of the subjects. It is one of the salient traits of the history of Prussia. . . . For a long time Prussia did not exist as a nation; it existed however as a State. . . . What bond united the subjects of the Prussian king? The State, that sovereign majesty and ultimate power on earth." [23]

It is, in fact, the Prussian State which Hegel had in mind in his analysis of the internal constitution of a particular State.

The institutions of a State form its constitution. "They form in a particular state a developed and realized rationality and are by virtue thereof the steadfast basis of the State — determining the temper of individuals toward the State and their confidence in it. They are also the foundation stones of general liberty, since in them particular liberty becomes realized in a rational form; and reasonably so, inasmuch as the union of liberty and of necessity exist therein." [24] Here again we find the ever recurring identity of opposites. We have in it the identity of liberty and of necessity, the synthesis of which is realized in the institutions of the State.

V

What institutions best secure concrete liberty in realizing equally the synthesis of liberty and of necessity?

To answer the question, it is necessary to know that the political institutions must make an organism of the State, that is to say, must realize the development of the idea in its divers elements, and give to each an objective reality. This organism is the political constitution. It always grows out of the constitution of the State as it is maintained thereby.

The different elements of such organism are the different powers (*Gewälten*), both their acts and their activity, "by which the uni-

[22] Lévy-Bruhl, L'Allemagne depuis Leibniz, p. 393.

[23] Lévy-Bruhl, *l. c.* pp. 415 and 416.

[24] Hegel, *l. c.* p. 328. [Dyde, p. 254; Hegel, Grundlinien, 2 ed., p. 321. — Translator.]

versal is uninterruptedly realized by a necessary process, since these various powers proceed from the nature of the conception. The universal is, however, none the less self-contained, since it is already presupposed in its own productive process." [25]

Two powers appear first. The one which manifests itself in the organic relations of the State with itself, and the other by which the State enters into relation with other States. The first of these powers is the civil power; the second, the military power.

The internal organism of the State comprises several elements which may be distinguished by a rational analysis. These different elements are of rational order; they form distinct powers; but each one of these powers, nevertheless, contains in itself the whole State; and their reunion forms the individuality — one and indivisible — of the State. There are several powers of the State, each having omnipotence; but there is, however, only one State, one and indivisible. The mystery of plurality in unity, and of unity in plurality, is analogous, as we have seen, to the doctrine of Kant.[26]

The principal passage in which Hegel formulates this idea is as follows: "The constitution will be rational in so far as the State divides and determines its reality according to the nature of the idea (*la notion*) in itself, and in such a way that each one of the powers in itself may be the totality by virtue of the fact that it has and conserves in itself the other elements, and that, because they express a division of the idea (*la notion*), they remain in its ideality and form, therefore, only an individual whole." [27]

We must not regard, then, these different powers as interfering with one another, as antagonizing one another, as limiting one another. Such would be a grave error; it would be opposed to the substantial unity of the State. The error is dangerous and fatal. Hegel adds, and justly, that the French revolution committed this error several times to the detriment of stable government. In reality, declares the philosopher, the powers neither resist nor actively oppose one another; they form the substantial unity of the State.

Upon such a supposition the State is composed of the following substantial elements:

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[25] Hegel, *l. c.* p. 331. [Dyde, pp. 256–7. — Translator.]

[26] *Cf. supra*, chap. III, section III.

[27] Hegel, *l. c.* p. 351.

First, the power of determining the universal and of establishing it. This is the legislative power.

Second, the power of *subsumption* of particular spheres and of individual cases under the universal. This is the governmental power.

We must not fail to observe that Hegel has expressed in complicated and obscure language a singularly simple idea which is this: the legislative power enacts dispositions by way of general provision; the governmental power renders individual and concrete decisions in conformity to the general rule formulated by the legislative power.

Third, the power of subjectivity. It is the power of supreme voluntary decree, the power of the prince. In the power of the prince (*le pouvoir princier*) are found reunited the other powers in an individual unity; it is thus the zenith and the culminating point of everything pertaining to the State.

The fundamental conception of Hegelian philosophy is ever reappearing. The general and the particular oppose each other; they fuse and synthesize each other in the individual. The legislative power is the general; the governmental power is the particular. They combine with each other in the individual unity which is the power of the prince. It is that which gives obligatory force to the enactments of the legislator and decrees of the government. It is the culmination and the acme of all.

This power of the prince is the power of the constitutional monarch in the modern State.[28]

Besides, for Hegel, it is not a question really to determine which is the best sort of constitution. It is not a question of discussing whether the modern State should be monarchical, aristocratic, or democratic. These three forms which have existed distinct in the past are now only the composite elements of the modern State. They are embodied today in a superior form which is more complex, namely, the constitutional monarchy, in which the monarch is the capital and sovereign element — synthesis of the legislative, which is the general and of the governmental, which is the particular.

Another idle question is also that of trying to determine who makes the constitution. This question implies that at a certain moment there is no constitution and consequently no State. There is always a pre-existing constitution. There cannot be any question

[28] Hegel, *l. c.* p. 355.

then of making a constitution, but only the question of modifying the existing one. The constitution itself is not the work of men. To say that would be to say that the State is a creation of individual wills. The constitution of the State is not the conscious work of men; it proceeds from the very life of the idea realized in the State.

Hegel insists on this idea, namely, that the constitutions of States are not works created by human art but are of natural formation; the spontaneous product of the march of the spirit in the world which naturally creates the State.

"Spirit," says he, "is real only in what it knows itself to be. The State, which is the nation's spirit, is the law which permeates all its relations, ethical observances, and the consciousness of its individuals. Hence the constitution of a people depends mainly on the kind and character of its self-consciousness. In it are found both its subjective freedom and the actuality of the constitution." [29]

VI

In the natural development of the understanding, modern peoples have arrived at the constitutional monarchy as the superior form of State, in which as we have already said, according to Hegel, the prince synthesizes, in his sovereign person, the power of decreeing through a general medium known as the legislative power, and the power of particular decision known as the governmental power.

It is reiterated by Hegel in the following passage, which is particularly significant: "In the constitutional monarchy the power of the prince contains within itself three elements of totality: the generality of the constitution and of the law, the council which maintains the relation of the particular to the general, and the element of supreme decision so far as it is self-determinate which is the epitome of all the rest, and in which everything has its beginning and realization. This absolute self-determination is the decisive principle of the princely power as such." [30]

We therefore find ourselves in a superior stage of absolutism. It is not only the State as such which, being the realization of the moral idea, is of absolute power. It is really the prince, the monarch. Among the superior peoples of the modern epoch, Prussia included, the State has assumed the form of a constitutional monarchy,

[29] Hegel, *l.c.* p. 360. [I have used Dyde, p. 282.—Translator.] [30] Hegel, *l.c.* p. 361.

which is the form *par excellence* of the State. Substantial unity is found in such a state through the sovereign; it is he who reunites, within himself, the three elements of political totality. Everything comes from him; everything goes to him; he is the beginning and the end. He possesses supreme self-determination.

This doctrine of Hegel's imposes itself on men's minds with all the more force because it is presented as an absolute truth revealed by reason and realized in the progress of the State, not as a contingent solution, ever debatable, and varying according to time and country.

The omnipotence of the State, the beginning and the end of which is found in the person of the monarch, is called sovereignty. Hegel finds in it two characteristics, namely: first, that the particular acts and powers of the State are neither for itself, nor autonomous, established in the particular wills of individuals; secondly, that their very origin is found in the unity of the State as in their simple self — which is internal sovereignty.[31] (There is another side to sovereignty, namely, external sovereignty about which we shall speak later.)

Hegel, however, would not have us confound sovereignty and despotism: "It is an error," says he, "to confound sovereignty with the arbitrary and the despotic. Sovereignty is the ideality of every particular power. . . . Despotism connotes lawlessness — where the particular will is equivalent to law, or rather takes the place of law, be it that of the monarch or of the people; while, on the contrary, sovereignty — more precisely the legal, constitutional State — brings about ideality of the various spheres of interest and of particular acts, so that these spheres and acts may not be independent, that is to say, autonomous in their end and effects, thereby destroying themselves in one another; but, on the contrary, their ends and modes of action may be determined by the end of the whole, and be thereby dependent upon it." [32]

In simpler terms it is sovereignty which makes particular activities coincide with the general activity, particular ends with universal ends. It is sovereignty which, residing in the individual person of the prince, realizes in the individual the fusion of the particular and of the universal.

Hegel does not stop there. He proceeds to analyze more closely the nature of sovereignty. It is, according to him, a will having

[31] Hegel, *l. c.* p. 363. [32] Hegel, *l. c.* p. 364.

the power of rendering final decrees. The sovereignty, having a will, is a personality, a subjectivity. Sovereignty is also individual. But it is more than that, because it is incarnate in an individual. This individual is the monarch.

Here should be given a literal translation of the very text of Hegel, in which in spite of the extreme abstraction of its terms, the thought is apparent. "Sovereignty, considered first from the general point of view of ideality, exists only as the ideality of its own definite subjectivity and as the abstract of its own self-determinate will, acting in this without a determinant motive, and being absolute in its decree. This is the individual element of the State as such, which, by virtue of this element, can be only one and indivisible. But it finds its subjectivity in fact only in itself as subject; personality only in itself as person; and in the constitution developed to the point of real rationality each one of the three elements of the notion is really formed specially for itself. This composite whole, decreeing in this absolute way, is consequently not individuality, but an individual, the monarch." [33]

A few pages further on Hegel returns again to the same idea, expressing it in more precise language. After having shown that the State, taken in itself must be considered a person, he concludes with this statement: "The personality of the State is singularly like a person; the monarch is really a person. Personality explains the idea as such; the idea of person is, through the monarch, given reality; and it is only by this means that the notion is an idea, that is to say, truth. . . . The dignity of the monarch is represented as something derivative in its nature, not only as to the form, but also as to its determination; its notion is rather not a derivative, but beginning simply to come unto itself. Accordingly, the conception which represents the right of the monarch as founded upon divine authority is wholly exact, because in such notion is contained the unconditioned part of the monarch's right. But we recognize what errors have grown out of this conception, and therefore the problem for philosophy is to determine that part which is truly divine in the monarch." [34]

In this doctrine of Hegel's, the personality of the State is found in the person of the monarch, whose native and unconditioned power is the synthesis of all the power of the State. One can easily

[33] Hegel, *l. c.* p. 365. [34] Hegel, *l. c.* pp. 366 and 367.

see in this the germ of all the doctrines of public law formulated by contemporary German jurists, — the Gerbers, the Labands, the Jellineks, who turn such public power into a subjective right of the State, and who see the monarch as a direct and all-powerful organ of the State. In a word, this is the germ of the subjectivist and organicist doctrines of public law which the German publicists have made special effort to construct for the purpose of giving a juridical appearance to the omnipotence of princes in general, and of the emperor in particular.

This sovereignty of the monarch being thus affirmed, what becomes of the sovereignty of the people in Hegel's philosophy? The question, which could not escape the attention of the philosopher, he attempts to answer at great length.

In speaking, says he, of the sovereignty of the people, we can only mean that a nation is outwardly autonomous, and forms a regular State like the people of Great Britain, for example. But the people of England, of Scotland, of Venice, of Genoa, are no longer sovereign peoples, since they have ceased having regular princes or supreme governments. We can also say this of internal sovereignty, that it resides in the people "when we speak merely of the whole," even though it has been shown that sovereignty belongs not to the people but to the State.

"In its customary meaning," adds the philosopher, "in the modern epoch when we think of the sovereignty of the people, we contradistinguish it from sovereignty existing in the person of the monarch. Taken in this directly opposite meaning, the sovereignty of the people has a connotation of lawlessness (*wüste*)"[35] — the basis of which can be traced to that deplorable institution, popular representation. "The people, taken without its monarch and without the organization of the whole, which is the necessary and immediate consequence of it, is a shapeless mass, which is no longer a State, no longer having such decisions as can be found only in the organized whole in itself, that is to say, in sovereignty, in government, in tribunals, in a supreme council, in States. It is only when these elements are related to the organization, to the life of the State appearing in the people, that what

[35] The word, *wüste*, which Hegel uses to mean national sovereignty as distinguished from the sovereignty of the monarch, is a word connoting exceeding contempt in the German.

is called in a general way, the people, ceases to be an indeterminate abstraction."[36]

Finally, according to Hegel, if we understand by sovereignty of the people the republican political form of government, or more precisely democracy, we must remember that the modern State has gone beyond such phase of democracy and of republicanism, and has arrived at a superior form, the stage of constitutional monarchy.[37]

VII

Hegel's doctrine with reference to government presents nothing particularly interesting. To him government is the executor of princely decisions. It is comprised of the police (*la police*) and the tribunals; it decrees with respect to particular cases in conformance with the general ends in view. The power of the government is exercised by its ministers, by the different functionaries, by the different tribunals, all of which are merely the agents of the monarch for such purposes.

These very simple ideas Hegel expresses in abstract terminology peculiar to him, an example of which is the following: "The governmental authority executes and applies the prince's decrees; it executes and enforces what has been decided, namely, existing laws, institutions, ordinances, and all with an eye toward general ends. The power of government in itself is found in this very act of *subsumption*, it is made up of the police power and the power of the tribunals, powers that refer to the particulars of civil society and have the general interest as their end." [38]

As for the legislative power it has to do with laws as such, in so far as they need a more complete expression; and with internal affairs, wholly general in character, according to their content.

But, insists Hegel, we should form a false idea of the legislative power if we thought it was a matter exclusively for parliament; and if we wished to give to the parliament, inasmuch as it is the legislative power, an existence absolutely independent of the other powers. "The conception of independence of powers," writes the philosopher, "contains within itself that fundamental error that independent powers must, nevertheless, delimit one another. By

[36] Hegel, *l. c.* p. 368.

[37] *Cf. supra*, chap. V, sections V and VI.

[38] Hegel, *l. c.* p. 280.

virtue of such independence, the unity of the State finds itself suppressed — a unity which must, above all, be realized." [39]

Consequently, in the Hegelian doctrine, the three elements corresponding to the three powers must co-operate in the execution of laws. Above all, the monarch, vested with the power of supreme decision, must alone see to it that the law becomes an obligatory rule binding on and requiring the obedience of all. The theory underlying this idea will be taken up again for the purpose of showing its development by the greatest contemporary theorist on imperial omnipotence, namely, the publicist, Laband.[40]

The government participates also in the making of laws. It alone in fact has the actual knowledge and is competent to oversee the whole in its complexity; it alone can grasp the essential principles which have been proclaimed as regards this whole; it alone understands the needs attendant upon the power of the State. The government will therefore intervene by such agencies as the councils of the crown, which must take their place beside the sovereign in all organized states.

Finally, parliament participates also in the making of law, and Hegel reduces to a minimum its part in collaborating in legislative work. He also calls parliament a body representing class interests (*das standische Element*).[41] He speaks of it with evident disdain. "We often imagine," says he, "that the representatives of the people or the people themselves can discern much better than anyone else what is good for them, and are best able to bring it about. This is a great mistake. If by people we mean that which is neither the sovereign nor its officers, we must admit that the people are wholly unable to determine what are the real interests of the State. The people are that part of the State that know not their own wants. The higher officers are very much better posted as to the needs of the State, and can very much better see to them than parliament — even without the aid of parliament." [42]

What is then, according to Hegel, the part that parliament plays? He recognizes that it guarantees the general good and liberty. Thus, on the one hand, parliament gives advice that can be useful

[39] Hegel, *l. c.* p. 392.

[40] Laband, Droit public de l'empire allemand, French translation, 1901, II, p. 260 and following.

[41] Hegel, *l. c.* p. 392.

[42] Hegel, *l. c.* p. 393.

to the government. The debates of parliament, on the other hand, give publicity to matters, and exert a control that can only react efficaciously and usefully upon those in the power.

But that is not to Hegel the more cogent explanation for the existence of parliaments. They are also a logical deduction from the idea; and therein lies the philosophical and consequently the true reason for their existence. There is undoubted progress when a State in which the monarch exercises unlimited power sets up a parliament. There exists then, in fact, one degree higher as to organization. Without a parliament the popular mass remains inorganic, atomic. With the parliament, it becomes organized. Popular opinion comes into being in a legal and regular form. Violence and conflicts in interests are avoided. The popular mass takes part to the extent of its capabilities in the life of the State.[43]

But in no case does Hegel admit that the parliament should be elected by universal suffrage. "That all," says he, "considered individually, must take part in the deliberations and decisions with respect to matters affecting the general interests of the State because all are members of the State and because the affairs of the State are the affairs of all, are false declamations. The State, being essentially an organization of its members, forms spheres of action; and, therefore, within the State no element should appear as an inorganic mass." [44]

Hegel also rejects representation, as we habitually understand it, that is to say, representation of individuals. In reality, it is not individuals who are represented, but the important social interests: agriculture, commerce, industry. Elections are wholly secondary. The philosopher, ever having the Prussian State in mind, naturally believes there should be two assemblies: An assembly of lords representing the landowners, hereditary in character, and having as its members only persons possessing entailed estates; and an assembly representing a less permanent element — those interests less permanent in character. It is well known that such is still in the main the organization of the Prussian Parliament.[45]

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[43] Hegel, *l. c.* pp. 393 and following.

[44] Hegel, *l. c.* p. 397.

[45] *Cf.* as to this part of Hegel's political philosophy, Lévy-Bruhl's L'Allemagne depuis Leibniz, pp. 404 and 405.

It is important to repeat that in the Hegelian doctrine the parliament in truth does not make the law. It expresses current opinions. Through the publicity given to its deliberations, it can, however, enlighten public opinion. But in reality it plays only the part of a board of consultation. The king and the ministers merely take the advice of the two assemblies for enlightenment; they are not bound to follow such advice. The king alone has the power of giving a final decision. It is the monarch alone who formulates the final decrees of law. It has been mentioned previously that this conception of Hegel's was the inspiration for the theory of law formulated by Laband, the great publicist of the German empire.[46]

VIII

We have previously seen that Hegel distinguished between internal law (*le droit interne*) of the state and external law (*le droit externe*) of the State. Thus we read according to his formula: "The idea of the State passes into the relation of the particular State with other States; this is external public law (*le droit public externe*), the external right of the State." It is what is usually termed international law. The philosopher devotes much less time to its development than to internal law. The most salient feature of Hegel's doctrine on this point is his apology for war.

The sovereignty of the State, considered externally, is its personal individuality in its relations with the personal individuality of other States. Hegel explains this quite clearly: "Such individuality, existing exclusively for itself, appears in its relations with other States, each one of which is autonomous with regard to the others. Since it is in this autonomy that the 'for-itself' (*pour soi*) of the real spirit of the State has its existence, this autonomy is the first freedom and highest dignity of a people." [47]

Hegel says again: "The State acts externally as an individual subject, but (as we have seen above) this subjective individuality of the State is incarnate in an individual, namely, the sovereign monarch. Consequently, it logically and naturally devolves upon the monarch to direct, in essential matters, the external activity of the State, or which is the same thing, the external sovereignty.

[46] Laband, Le droit public de l'empire allemand, French translation 1901, Vol. II, pp. 260 and following.

[47] Hegel, *l. c.* p. 416. [Dyde, p. 329. — Translator.]

. . . To look after the relations of a State with other States, therefore, is within the princely power, and it has for its primary duty the commanding of the armed force, the entertainment of relations with other States through ambassadors, the declaring of war, the making of treaties of peace as well as other treaties." [48]

This expresses Hegel's idea very clearly. The external rights of the State, then, prove the existence of its subjective individuality with respect to other States. This subjective individuality of the State is incarnate in the person of the monarch, and the latter therefore should have all the powers which have to do with international relations. He has thus, in its plenitude, external sovereignty just as he has internal sovereignty.

But this statement is not a solution, so far as knowing the foundation of international law is concerned. The problem, however, appears very clear in the mind of the philosopher. Internal sovereignty binds the subjects of the State because it is such sovereignty; that which it wishes and commands is the jural principle (*la règle de droit*) and obedience is therefore owed to it. But in international relations the State is in reaction with other sovereign States like itself. How can such States, without ceasing to be States, be subordinated to a superior principle (*une règle supérieure*) binding upon them? Hegel unquestionably foresees the difficulty but he offers no solution. Let us judge for ourselves. He thus writes: "Since there exists no power that can decide against the State what is right in itself, and which can assure the realization of such decision, we must as regards these relations always fall back on the moral duty (*soll*). The relations of States among themselves is the relation of autonomous beings which stipulate among themselves, relying at the same time upon these stipulations." [49]

At this point Hegel's ideas are clear. For him, there is in verity no international law; because there is no human power superior to the States which can formulate the jural principle (*la règle de droit*) applying to them and enforce their obedience to such principle. Only moral duties exist as between States. On the other hand, covenants can intervene between them, and these covenants will momentarily rule their relations.

The ideas of the philosopher in this respect are again precisely stated in the following passage: "The foundation of international

[48] Hegel, *l. c.* p. 423. [49] Hegel, *l. c.* p. 425.

law as general law could be valid in itself and for itself between States in contradistinction to particular pre-existing treaties, on the theory that the treaties, so far as they impose obligations upon States as among themselves, should (*sollen*) be respected." [50]

And so international law does not exist and cannot exist outside of international covenants. The concrete obligations of international law are those of treaties; but there is a general and superior principle over and above them, namely, the principle that international treaties must be respected.

If States are obliged to respect treaties which they have signed, what becomes then of the sovereignty of the State? What becomes of this divine and limitless power of the State — the reality of the moral idea? Hegel cannot abandon it. Since, therefore, the principle as to inviolability of treaties is logically irreconcilable with it, it is this principle in the last analysis which is sacrificed — thereby reducing international law to nothingness.

Let us judge for ourselves from the following passage, which I translate literally: "Because in regard to the relation of States among themselves, their sovereignty is the basic principle: *they are in that respect in the state of nature in regard to one another*, and *their rights are not realized in a general will so constituted as to have power over them; but their rights are realized only through their particular wills.* This situation, so determined, subsists, however, alongside the duty (*soll*) to respect treaties. There is in fact a succession of relations created by the signing and abrogation of treaties." [51]

One might just as well say that the State being sovereign is bound by treaties only so long as it so desires, and that the State can always withdraw from them when its interest demands it. This is the true belief of the philosopher, and we shall find it adhered to without reserve and without shame by the greatest jurisconsults of contemporary Germany.

Since States can always withdraw from the obligations contracted by them in their treaties whenever their interests demand it, there can be no solution other than war in respect to conflicts between them.[52] But we must not fear war. We cannot even make the attempt to imagine, like Kant, projects of perpetual peace. They are chimeras. War is good; war is excellent; war is fecund; war is holy. Hegel does not come far from saying, as did Joseph de

[50] Hegel, *l. c.* p. 426. [51] Hegel, *l. c.* p. 427. [52] Hegel, *l. c.* p. 427.

Maistre, that war is divine, and he certainly thinks so. The two philosophers can shake hands with respect to the ignominy of such a doctrine.[53]

War is indispensable, according to Hegel, as regards the moral vigor of peoples. It is war which makes us truly understand the fragility of human goods and of human things. Without war these words mean nothing. War is "the moment when ideality of the particular obtains its right and becomes reality." War is of superior importance in founding the morality of peoples, in securing them against indifference in regard to the inevitable arrival of final certitude "in the same way that the movement of the winds guarantees to the seas a security from corruption which would come upon them in their calm." [54]

IX

We have finally reached the third element of the idea of the State. Let us recall, however, that according to Hegel's idea of the State it is comprised of three elements: First, the internal right (*le droit interne*) of the State; Second, the external right (*le droit externe*) of the State; Third, the State as the general idea, as the absolute genus and the absolute power, as contradistinguished from individual States — that which is mind or spirit (*l'esprit*) gaining its reality in the progress of the history of the world.[55]

It is fitting here to translate literally a few pages in which the philosopher, wishing to show how spirit or the idea is realized in the history of the world, formulates his general conclusions with respect to the State. He writes: "In the relations of States with one another, since they are in this respect, particular and autonomous elements, there appears the very best example of the internal particularity of passions, of interests, of ends, of talents, and of virtues, of power, of non-right, and of crimes, like external accidents with the greatest extent of phenomenon, showing that even the moral whole — the autonomy of the State — is exposed to

[53] Joseph de Maistre wrote thus: "War is divine in itself because it is the law of the world. War is made divine through the consequences it brings about. . . . War is divine on account of the mysterious glory which surrounds it. . . . War is divine by virtue of its mode of inception. . . . War is divine as regards its results." (Les soirées de St. Pétersbourg, seventh edition, the Parisian edition, 1872, Vol. II, pp. 33 and following.)

[54] Hegel, *l. c.* p. 418.

[55] *Cf. supra*, chap. V, section II.

contingency. The underlying principles of the minds of peoples, due to their particularity in which in their character of existing individuals, they have their objective reality and their own consciousness — these principles are especially limited; and their ends and their acts in their relations between themselves are the dialectic of the finality of minds, according to which the general spirit, the spirit of the world, proceeds, inasmuch as it is non-limited, and as such (*i.e.*, the spirit of the world) exercises its right. Its right is the highest of all. It exercises its right over them in the history of the world as before the tribunal of the world." [56]

This last sentence which is often quoted separately from what precedes and follows it may be translated thus: "The history of the world is the tribunal of the world." This translation does not follow the text closely, and, moreover, does not betray the ideas of the philosopher. We shall see this a little further on.

Hegel thus continues: "The living element of the general spirit, which in art is vision and imagination, in religion, sentiment and representation, in philosophy, pure and free thought, is in the history of the world spiritual reality in its entire sphere of interiority and exteriority. The history of the world is a tribunal because in its generality existing in itself and for itself, the individuals, the penates (the family), civil society, and the minds of the people with their heterogeneous realities, are only as ideals; and the progress of the mind is to represent the spirit in this living element."

"Moreover, the history of the world is not the simple tribunal of such power, that is to say, the abstract and irrational necessity of a blind destiny; but because this destiny is reason in itself and for itself, and because its existence for itself is understood by the mind, the history of the world is the necessary development of the elements of reason, starting from the mere notion of its liberty, and passing from that to the notion of its consciousness and of its liberty, and then to an extension and development of the general spirit." [57]

There is no doubt that these formulas, in which abstraction is carried to its very limits, are somewhat obscure. Here may be given what I believe, as does M. Lévy-Bruhl, the epitome of the philosopher's ideas and the conclusion of his doctrine in respect of the State.[58]

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[56] Hegel, *l. c.* p. 430.

[57] Hegel, *l. c.* p. 431.

[58] *Cf.* Lévy-Bruhl, L'Allemagne depuis Leibniz, pp. 410 and 411.

The development of the idea realized by the State is accomplished in the world through the struggles, the foundations, and the fall of empires — the triumphs and the disasters of nations. War, violence, oppression, are the necessary factors of such developments, and "the history of the world is the tribunal of the world." We must not translate this sentence as is often done by the celebrated formula: "Force comes before right." Such is not Hegel's belief. What he means is that wars, violence, force, give birth to right; the progress of the spirit of the world develops through violence of all kinds and in spite of this violence. It develops in the peoples and by the peoples that triumph in these struggles, in such wars, in violence of all kinds. But that triumph is not due to pure hazard. These peoples triumph by their work, by their strength, by their courage, by their spirit of sacrifice and of perseverance. They deserve to triumph; their victory is a proof of it; and the history of the world, which is the tribunal of the world, so decides.

About the beginning of the war, Max Harden wrote in his review, *Die Zukunft:* "It is not against our will that we are thrown into this gigantic adventure. It has not been imposed upon us by surprise. We have wanted it: we must have wanted it. We do not appear before the tribunal of Europe; we do not recognize similar tribunals. Our strength will create a new law in Europe. It is Germany who knocks. When it shall have conquered new domains for its genius, then the priests of all the gods will boast of the blessedness of the war. . . . Germany is not waging this war in order to punish the guilty or to liberate oppressed peoples and afterwards to sit back with full consciousness of its disinterested magnanimity. It has waged it because it has immutable conviction that its deeds have given it a right to a more significant position in the world and a right to greater outlets for its activity." [59]

Harden, speaking in this way, shows himself to be a faithful interpreter of the master's ideas. Marshal Von der Goltz was acting the pure Hegelian, probably without being aware of it, when he answered the Bishop of Liège, Monseigneur Rutter, who at the time was complaining about the excesses of the German soldiers:

[59] *Die Zukunft*, August, 1914; cited from a pamphlet entitled Paroles allemandes, published by Berger Levrault, with a preface by the Reverend M. Wetterle.

"We will conquer, Monseigneur, and the glory will eradicate all." [60]

Hegel's ideas can again be seen very clearly in his division of the history of the world into four great periods. In the necessary and rational progress, which is the development of the idea, the people who represent any given period of this development have an absolute right against all other peoples, and the latter are devoid of right against such a nation. The peoples whose epoch has passed do not count in the history of the world any more than do political forms when their time among the forms of the State has passed. The history of peoples is divided into four great periods: the Oriental period, the Greek period, the Latin period, and the Germanic period.[61]

The Oriental, Greek, and Latin periods have passed and will never appear again. We are now in the Germanic period, that is, in the period in which the Germanic elements have everywhere preponderance, and by virtue of which they realize right, since the history of the world is the tribunal of the world. The modern world realizes through Germanic genius the triumph of science and of liberty, and by virtue thereof at the same time the union of divinity and of humanity.

But, nevertheless, Germanic genius itself has not taken the last step in this divine and eternal progress which is the history of the world. This last stage is attained only beyond political and social life where the idea is conceived in an even higher and superior form, namely, the absolute spirit, God, unity in itself and for itself, unity of the object and of the subject, the third part of the philosophy of the mind.[62]

We have in this, then, the whole political philosophy of Hegel and some idea of the manner in which it takes form in infinite variety in his whole philosophical system. His influence upon the doctrines of German publicists and upon the formation of the abominable mentality of contemporary Germany has been prodigious. In the remainder of this paper, the effect of Hegel's philosophy on the theories of public law formulated in our epoch by professional German jurists will be clearly seen.

[60] See the Journal le Tyd, April 22, 1916.

[61] Hegel, *l. c.* p. 436.

[62] *Cf.* Archambault's Hegel, p. 27 *et seq.*

CHAPTER VI

METAPHYSICAL AND INDIVIDUALISTIC DOCTRINES IN FRANCE SINCE THE REVOLUTION

FROM the preceding chapters it may be seen that in the first quarter of the nineteenth century all metaphysical conceptions of the State agree on this point, namely, that the State is a sovereign personality, that is to say, a personality distinct from individuals and invested with an independent will, having no superior above it on earth. We also agree on this point, that the individual has a free and autonomous will.

But, on the other hand, in the Declaration of Rights of 1789, it is affirmed that the natural rights of the individual subsist intact and inviolable in society organized as a State; that the autonomy of the individual is opposed to the power of the State and limits it; that the State, even through the law, can do nothing which may be an infringement of this autonomy; that it can limit the liberty of each only to the extent necessary to protect the liberty of all; and that it can do this only by a law, that is to say, by means of a disposition by way of general provision, voted on by the people or by their representatives.

With Jean Jacques Rousseau, Kant, or Hegel, on the other hand, we would proceed in this manner: Undoubtedly the person of the individual is autonomous; the individual possesses a personality endowed with a free will. The individual as such has rights, but these rights of the individual exist only in the State, and through the State; the autonomy of the human person is not in truth realized except through the State. The formulas of Jean Jacques Rousseau, of Kant, and of Hegel are different; but the idea is ever the same. When speaking for them no mention can be made of limitations upon the power of the State, brought about for the interest of the individual, since the individual is really free only through the sovereignty of the State; to affirm that the liberty of the individual comes to limit the sovereignty of the State is to deny this sovereignty.

The latter tendency is associated with most of the German doctrines which admit the metaphysical conception of the State. From the first tendency, on the contrary, most of the French doctrines draw their inspirations.

I

We can qualify as French classical doctrine that which was formulated in the Declaration of Rights in 1789, as discussed previously in Chapter I. It was the inspiration for all our constitutions and all our codes; up to within the last few years it has been taught dogmatically by all law faculties and can be found in all treatises on public law and administrative law.

We must admit, however, that with respect to certain points of application fundamental differences separate the various representatives of the doctrines, even though they may be in accord as to the foregoing principle.

If at the outset we agree in believing that a negative limitation is imposed upon the State, it is not the same as believing that positive obligations also are imposed on it. The State cannot juridically do certain things; but is there juridical constraint upon it to prevent it from so doing? Some say yes; others say no.

A divergence also appears as to what is regarded as the sanction of the obligations binding on the State. All agree in teaching that the State must become so organized that the danger of violations of law will be reduced to the minimum. But if in spite of this organization the State makes laws contrary to right, or orders things to be done in violation of it, do the individuals owe obedience? It is the extremely old and ever pressing question in another form, namely, resistance to oppression. May the individual refuse to obey oppressive law, that is, law contrary to the higher law (*au droit supérieur*), which is binding on the State? May he by force offer resistance to such acts of constraint as are contrary to right? If this oppression persists, may he even revolt against the oppressing rulers who wield such power?

The Declaration of Rights of 1789 and of 1793 place resistance to oppression among the natural and indefeasible rights of man. No mention is made of it in the Declaration of Rights of the Year III. The French classical doctrine has always been divided on this point, and as we shall see in the rest of the chapter, although

celebrated jurisconsults affirm that obedience is always due the law — the expression of the general will — and that every contrary doctrine must be rejected as anarchical, publicists of great authority and of great renown teach that nobody owes obedience to law when it is contrary to right, and that every revolution which tends to overthrow an oppressive government is legitimate.

I do not intend to analyze the writings of all the French publicists and jurists who, from the Revolution to the present, have at the same time accepted the metaphysical conception of the State and founded the limitation of its powers upon the recognition of the natural and indefeasible rights of the individual. This is, in fact, the almost unanimous opinion of French jurists and publicists. I shall speak only of those who appear to be the best representatives of the doctrine, and I believe that there are none superior to Benjamin Constant in the first half of the nineteenth century and Esmein in our own time. I have a purpose in bringing together a political theorist and a jurist. Such a comparison with the contrasts resulting therefrom will perhaps show better than in any other way the impotence of the individualistic doctrine in creating juridical limitations upon the powers of the State, when declaring the State to be sovereign — in short, its impotence to solve the irremissible contradiction that exists between the sovereignty of the State and the autonomy of the individual.

II

We know that Benjamin Constant, one of the most vigorous and brilliant minds of the first thirty years of the nineteenth century (Benjamin Constant died in 1831) has written numerous articles and pamphlets on questions of constitutional law collected and published in his lifetime, entitled *Constitutional Politics*.[1]

The idea of a recognized and guaranteed juridical limitation upon the sovereignty of the State appears dominant throughout his whole work. He rightly believed that the very principle of juridical limitation upon the powers of the State clashes fatally with the principle of national sovereignty; he feared especially the general-will conception, as Jean Jacques Rousseau develops it,

[1] Benjamin Constant, Cours de politique constitutionnelle, four volumes, Paris, 1819.

according to which it is said that the general will cannot err, that it is always imposed on individuals, that in constraining individuals in spite of their resistance "it simply forces them to be free," that it is the only criterion without reserve or appeal of the limitations to be placed on the liberty of individuals. Benjamin Constant attempts above everything else to guard the citizen against the dangers of such a doctrine.

He thus writes especially: "In a society founded on the sovereignty of the people, it is certain that no individual or class has the right to place the others in submission to its particular will. But it is a mistake to say that all society possesses a limitless sovereignty over its members. . . . Sovereignty exists only in a limited and relative manner. At the point where the independence of individual existence begins, the jurisdiction of this sovereignty ends. If society goes beyond this line, it is as guilty as the despot who only has for title the exterminating sword. Society cannot go beyond its competency without being a usurper; nor can the majority without being rebellious." [2]

Benjamin Constant especially denounces and combats the sophism of the omnipotence of the majority. Rousseau had said: "When an opinion contrary to mine succeeds, that proves very clearly that I was wrong and that what I believed was the general will was not; in forcing me to obey the majority, I am only forced to be free." [3] Benjamin Constant thus rightly answers: "The assent of the majority is not sufficient in all cases to make such authoritative acts legitimate. There are some things that nothing can sanction. When any authority whatever commits such acts, the source from which such authority emanates matters little; whether it is called individual or a nation is of no consequence; even though it emanates from the whole nation, minus the citizen that is oppressed thereby, it cannot be any more legitimate. Rousseau failed to recognize this truth, and his error has made the *Contrat Social*, so often invoked in favor of liberty, the most vicious auxiliary to every kind of despotism." [4]

It could not have been stated better; and had Benjamin Constant lived sixty years later, he would have seen his prediction confirmed

[2] Benjamin Constant, *l. c.* I, p. 177.

[3] Jean Jacques Rousseau, Contrat social, Bk. I, chap. VII, and Bk. IV, chap. II.

[4] Benjamin Constant, *l. c.* I, pp. 178 and 179.

by all the German absolutist doctrines of which Rousseau was the true inspiration through the intermediary of Kant and of Hegel.

Benjamin Constant moreover ruthlessly criticises the *Contrat Social;* he does not leave a single principle of the system unassailed. One passage deserves being quoted at length: "Jean Jacques Rousseau defines the contract entered into by society and its members as a complete alienation, without reserve, by each individual of all his rights to the community. To reassure us as to the consequences of such an absolute abandonment with respect to all phases of our existence for the benefit of an abstract being, he tells us that the sovereign, that is to say, the social body, cannot do injury either to its members collectively, or to any one of them in particular, . . . ; that each one by giving himself up for all gives himself up in reality. . . . But he forgets that all these preservative attributes which he confers upon the abstract being called the sovereign result in this, that this being is made up of all individuals without any exceptions. As soon, then, as the sovereign is compelled to make use of the power which he possesses, that is to say, as soon as he finds it necessary to proceed to a practical organization of authority, since the sovereign cannot exercise it single handed, he delegates it, with the result that all these attributes disappear. Acts done in the name of all, whether one will or not, being necessarily in the control of only one person or of a few, it eventuates that in giving one's self to all it does not follow that one gives one's self to none; one gives one's self on the contrary to those who act in the name of all. . . . As soon as the general will becomes all powerful the representatives of this general will become all the more formidable in that they call themselves only docile instruments of this pretended will and because they have in hand the means of force or of solicitation necessary to secure the manifestation of it in the way which suits them best. What no tyrant would dare to do in his own name, they legitimize through this limitless social authority. . . . The people conceived as all powerful are, as such, as dangerous as a tyrant; or rather it is certain that tyranny will avail itself of the right granted to the people. It will need only to proclaim the omnipotence of such people when menacing it; and to speak in its name when imposing silence upon it." [5]

[5] Benjamin Constant, *l. c.* I, pp. 179 to 183.

III

Benjamin Constant points out with exceeding skill and clearness that it is not only such and such organ of the State that has limited power, but that the very sovereignty of the State must also be limited, whatever organ of the State may exercise it. Many people following the constituents of 1791 believe in fact that they have placed the liberty of the individual on indestructible foundation in formulating the dogma of the separation of powers and in making the rules of political organization conform to it by declaring that each power should be narrowly limited to the sphere of action which devolved upon it by the constitution. Benjamin Constant shows truly enough that this is but a snare.

"Divide power as you will," says he, "if the sum of the powers is unlimited the different powers have only to form a coalition to have a irremediable despotism result. What matters for me is not that my rights can not be infringed by such a power without the approbation of another, but that such infringement be forbidden as regards all the powers. . . . Little does it matter that the executive power has not the right to act without the co-existence of a law, unless limits are placed upon such concurrence, unless we declare that there are matters concerning which the legislator has no right to legislate, or in other words, that the sovereignty is limited and that there are wills (*des volontés*) that neither the people, nor its delegates, have the right to have. That is what must be set forth; that is the important truth — the eternal principle which must be established. No authority on earth is unlimited; neither that of the people, nor that of men who call themselves its representatives, nor that of kings under whatever title they reign, nor that of the law which, being only the expression of the will of the people or of the prince according to the forms of government, must be circumscribed by the same limits as the authority from which it springs." [6]

These things which must be constantly repeated to peoples, to parliaments, to the heads of States, have never been enunciated more forcibly or more authoritatively.

Benjamin Constant could not stop there. He had to point out, in fact, the source of this principle and the measure of its limitations

[6] Benjamin Constant, Cours de politique constitutionnelle, I, pp. 187 and 188.

upon sovereignty. Thus he goes on to say: this principle and its magnitude are found in the limits "which are defined by justice and by the rights of individuals." [7] The idea of justice brings forth limitations of a moral character upon the power of the State. The recognition of natural and individual rights gives rise to a limitation in its nature juridical.

Benjamin Constant energetically vouches for the existence of these natural and indefeasible rights of the individual which juridically come to limit the power of the State. He defends them against the opposite negation of Bentham, who taught that the foundation of all law and all morality was utility. "Right," according to Benjamin Constant, "is a principle; utility is only a result. Right is a cause; utility is only an effect. Desire to subordinate right to utility is like wishing to place the eternal rules of arithmetic in submission to our daily interests." [8]

It is thus necessary to maintain energetically the affirmation that man is possessed of natural, inalienable, and indefeasible rights. "I maintain" says the publicist, "that individuals have rights and that these rights are independent of social authority, which cannot curtail them without becoming guilty of usurpation." [9]

But what is the sanction of this rule of limitation which is found to be binding on the State? Benjamin Constant does not ignore the difficulty of the question but admits that this is a possible objection to the doctrine of juridical limitation on the power of the State. But he is not overcome by such objection. "Undoubtedly," says he, "the abstract limitation of sovereignty does not suffice. It is necessary to find an origin of political institutions which will combine the interests of these different repositories of power in such a way that their most manifest, most desirable, most assured advantage must be that all remain within the limits of their respective provinces." [10].

But it is, moreover, necessary, whatever happens, to affirm solemnly and energetically that the powers of the State are limited by the rights of the individual; for, "without wishing, as philosophers have too often done, to exaggerate the influence of truth, one can assert that, when certain principles are fully and clearly set forth, they serve in one way or other as a guarantee of their own

[7] Benjamin Constant, *l. c.* I, p. 188.
[8] Benjamin Constant, *l. c.* I, p. 302.
[9] Benjamin Constant, *l. c.* I, p. 306.
[10] Benjamin Constant, *l. c.* I, p. 189.

existence. With regard to the evidence there is formed a universal opinion which soon becomes victorious. If limitations upon sovereignty are recognized, that is to say, if it is recognized that there exists on earth no unlimited power, no one at any time will dare to lay claim to a similar power. The very expression proves it at once. . . . Sovereign limitation is thus true and possible. It is to be guaranteed first by that force which guarantees all truths recognized by public opinion. Afterward it will be recognized more precisely in the distribution and balance of powers. But let us first recognize this salutary limitation. Without such preliminary caution, all will be naught. If the sovereignty of the people is held within its just bounds, there is nothing more to fear; despotism, either that of individuals or of assemblies, is bereft of its sanction, which is apparently derived from an assent that it commands, inasmuch as this assent, were it real, is proved to have no power of sanctioning anything." [11]

IV

But finally what will happen, if, in spite of the internal force of the principle of limitation, in spite of the organization established to protect the individual against despotism, the legislator, nevertheless, makes laws contrary to the rights of the individual — oppressive laws? In such a case must we obey the law? Benjamin Constant puts this question very neatly, and he shows with great clearness its gravity and difficulties.

"Nevertheless," says he, "when authority is abused, what must be done? We thus come to the question of obedience to law, one of the most difficult which can attract the attention of men. Whatever decision one ventures on this matter, one is exposed to unknown difficulties. Shall we say that we must obey laws only in so far as they are just? If so, we shall find ourselves authorizing resistance to law in cases most worthy of punishment; anarchy will be found everywhere. Or shall we admit that we must obey the law, because it is law, without regard to its content or its source? If so, we shall be condemning ourselves to obey most atrocious decrees and most illegal authorities." [12]

The problem cannot be put in a better way. In spite of very

[11] Benjamin Constant, *l. c.* I, pp. 189 and 190.

[12] Benjamin Constant, *l. c.* I, pp. 306 and 307.

grave objections, in spite of the contrary authority of great minds like Pascal and Bacon, Benjamin Constant goes the whole way in respect of the logical consequences of his principle. If the legislator has only limited powers according to a superior principle of right, obedience cannot be due to laws which exceed this limitation and violate this principle. By rejecting this consequence we abandon the whole system. The affirmation of a juridical limitation upon the State becomes a vague, philosophical proposition without practical application and without effective sanction. Benjamin Constant explains this situation admirably, and at the same time he shows the different forms of refusal of obedience, just as the ancient theologians had carefully distinguished between the different kinds of resistance to oppression.

Benjamin Constant shows first that we cannot uphold the proposition that obedience is due unreservedly to every act called a law without absurd results. "Should calling a thing a law always suffice to oblige man to obedience? And again, if a number of men or even a single man without authority . . . give to the expression of their particular will the title of law, are the other members of society obliged to conform to it? The affirmation is absurd; but the opposite viewpoint implies that the mere calling a rule law does not of itself confer upon it the power of obedience, and that such duty supposes a previous determination of the source whence the law emanates. Shall we allow such examination knowing that it will raise a question of determining whether what is presented to us as a law emanates from a legitimate authority, but that once so enlightened the examination should not be allowed as to the very content of the law? It will then be necessary, in all systems, to grant that the individuals may resort to reason, not only to determine the character of the authorities but for the purpose of judging their acts. The necessity of examining the content as well as the source of the law results therefrom. Notice that those very people who make declarations that implicit obedience to laws, whatever those laws may be, is their absolute and bounden duty, always except from this rule the things which are of interest to them. Pascal, for instance, made an exception as to religion; he did not submit to the authority of civil law in matters of religion." [13]

[13] Benjamin Constant, *l. c.* I, pp. 306 to 308.

The right of the individual to refuse to obey a law contrary to right is incontestable. Without it law perforce becomes tyrannical. This pretended dogma of passive obedience to law has been the cause of many evils. But, at the same time, this right to refuse obedience to the law must be exercised only with great prudence and precaution. The oppressive character of the law can very clearly be seen when it is directly contrary to the natural rights recognized by all. It is better then to oppose the law with passive resistance. Then only do we do our duty, and this passive resistance does not cause trouble in society. Although Benjamin Constant does not say so expressly, he certainly believes in the existence of a supreme tribunal (*une haute jurisdiction*) in every State, chosen in such a way that independence, impartiality, and knowledge would be above suspicion of any kind; which upon requests from the citizens would be charged with deciding whether such laws conform to superior right, and which would have the power to annul such laws as are in contravention thereof.

It seems better on the whole to reproduce at length just what Benjamin Constant has to say in this respect: "Obedience to law," says he, "is a duty; but like all duties, it is not absolute; it is relative; it rests on the supposition that the law emanates from a legitimate source and is confined within just limits. This duty does not cease when the law differs only in certain respects from this rule. We must sacrifice a good deal for public peace; we should find ourselves guilty in the eyes of morality if by a too inflexible attachment to our rights we should disturb tranquillity as soon as it seemed to us that our rights were being infringed in the name of the law. We are under no such obligation as regards laws like those passed for example in 1793 or even later whose corrupting influence threatens that which is most respected of our whole existence. No duty would bind us in regard not only to laws which would restrain our legitimate liberties and restrain such of our actions as there is no right to forbid, but which would also command us to act contrary to the eternal principles of justice or of compassion, which men can refrain from observing only by belying their nature. The doctrine of obedience to law has caused through tyranny and storms of revolutions probably more evils than all the other errors which have led men astray. The most execrable passions have entrenched themselves behind this form, under an

impassive and impartial appearance, for no other purpose than the licensing of all sorts of excesses." [14]

Benjamin Constant does not limit himself to these general propositions; he states precisely the ways in which we may recognize a law which is contrary to right. "Retro-activity is the first of these characteristics. Men have consented to legal impediments (*aux entraves des lois*) only for the purpose of attaching to their actions certain definite consequences, thereby being able to direct matters themselves and to choose lines of conduct to their own liking. Retro-activity deprives them of this advantage. It shatters the conditions of the social pact; it takes away the benefits resulting from the sacrifice imposed by the social pact. A second characteristic of illegality in laws is the compelling of actions contrary to morals. Any law that commands that sort of information which involves denunciation is not a law. Any law that divides the citizens into classes, that punishes them for what has not happened on their account, that makes them responsible for acts not done by them — any such regulation is not a law." [15]

Finally, Benjamin Constant insists on another point, namely, that it is only with extreme prudence, with infinite caution, that we should invoke the incontestable right of refusing obedience to a law which is contrary to right; and that it is better to oppose it by a mere passive resistance. "I do not pretend to recommend disobedience in any way whatsoever. Let it be forbidden, not through deference for the authority which usurps, but through consideration for the citizen whom thoughtless struggles would deprive of the advantages of the social State. As long as a law, even though bad, does not tend to deprave us, as long as authority demands of us only sacrifices which render us neither vile nor ferocious we can submit to it. We compromise only for our own good. But should the law prescribe . . . that we trample our affection and devotion beneath our feet . . . cursed be and let disobedience follow such enactments of injustice and of crime thus dignified under the name of laws. [16]

"But passive resistance to the execution of an oppressive and tyrannical law is a general and permanent duty for ordinary

[14] Benjamin Constant, *l. c.* I, pp. 312 and 313.
[15] Benjamin Constant, *l. c.* I, pp. 313 and 314.
[16] Benjamin Constant, *l. c.* I, pp. 314 and 315.

citizens, for administrators, and for judges. Not to become a party to the execution of a law which appears to be unjust is one's positive, general, absolute duty. This force of inertia entails neither turmoil, revolution, nor disorder. There is no excuse for a man who lends his assistance in the carrying out of a law which he believes iniquitous, for the judge who presides in a court which he believes illegal or who pronounces a sentence of which he disapproves, for the minister who orders the execution of a decree contrary to his conscience, or for the satellite who arrests a man whom he knows to be innocent for the purpose of giving him up to his executioners." [17]

This passage plainly shows that Benjamin Constant believed that tribunals have not only the power but also are under bounden duty of determining the constitutionality, in the general sense, of laws invoked before them, and of refusing to apply such laws as they believe to be contrary to superior right, the very underpinning of the constitution.

V

We have just seen that Benjamin Constant has formulated the doctrine of limitation of the power of the State with the natural rights of the individual as a basis in the rather pompous style of his time, but with an admirable clearness and logical completeness. This doctrine has been and still is, we are happy to say, the French classical doctrine. Many publicists have not gone as far as Benjamin Constant, and have not recognized a right in the individual to refuse obedience to laws contrary to superior right (*au droit supérieur*). So, also, many have denied to tribunals the right of passing on the constitutionality of law. But in spite of these reservations, the principle of sovereignty limited by the rights of the individual is still dominant in French classical doctrine.

This doctrine has found its last and certainly its most faithful and complete expression in an excellent book of the deeply lamented Professor Esmein,[18] whose work is particularly interesting, first

[17] Benjamin Constant, *l. c.* I, pp. 315 and 316.

[18] Esmein, professor of law, one of the faculty at Paris, died at Paris, July 21, 1913. His scientific accomplishments have been rather extensive. Books and articles on all branches of law and the history of law have been published by him. His Éléments de droit constitutionnel français et comparés has become a classic. The first edition was published in 1896; the sixth in 1914, after his death, was published by M. Joseph

because it is at once that of a historian and of a professional jurist well versed in juridical technique, and secondly because the book is a remarkable attempt to construct an inflexible State with the principle behind the individualistic doctrine as a foundation. My only regret is that Professor Esmein did not dare to go the whole way, and, after having energetically affirmed the principle of limitation of the sovereignty of the State, did not recognize the right of the individual to refuse obedience to any law overstepping the limits of this sovereignty.

Esmein defines the State as the juridical personality of the nation. What constitutes, says he, a nation in law (*en droit*) is the existence in a society of men of an authority superior to the individual wills. What is the source of this authority? Is its power legitimate, and why? These are questions which all in all do not seem to interest the master. It is enough for him to declare that this authority does exist, that it must exist; and that, furthermore, such authority does not recognize any superior or opposing power so far as the relations of which it has control are concerned; that this authority is sovereignty; and that it has two aspects, namely, *internal* sovereignty, or the right to issue commands not only to all citizens of which the nation is composed but also to all those who are within the territorial boundaries of the nation and *external* sovereignty, or the right to represent the nation and to bind it in its relations with other nations.

Is the power of the sovereign State unlimited? Or on the contrary is there any limit to such power? If there is, upon what principle? What is its extent? Esmein does not fail in clearness in stating the question. His answer is equally clear: "It seems," he writes, "that sovereignty must necessarily be unlimited, and that consequently the right of the State should be also limitless. . . . Such was unquestionably the Greek and Roman conception. . . . One of the ideas most firmly established and most prolific in modern times, on the contrary, is that the individual has rights anterior and superior to those of the State. We shall see later how this conception of individual rights is justified, what is its origin, and the ways in which it is understood. But, for the time being, it is sufficient to recognize that this principle, once admitted, forms

Barthélemy. Reference is usually made to the sixth edition unless some other edition is specifically mentioned.

with all its consequences an essential end for constitutional law. In fact, it limits more narrowly than any other law the exercise of sovereignty, because it forbids the sovereign making laws which interfere with individual rights and commands him to promulgate those necessary to assure an efficacious enjoyment of these rights." [19]

Every organization of the State must be directed and, in the modern parliamentary State, has in fact been directed toward this end: to guarantee to the individual the respect and the protection of his individual rights; to protect individual liberty against the encroachments of the State. The whole work of Esmein is inspired by this idea; and the juridical construction which he puts upon the State is very logically and firmly established according to the principles of the individualistic doctrine and on the basis of the idea that sovereignty is the will of the nation politically organized.

For Esmein, however, the limitation upon sovereignty by individual rights does not go so far as to create an obligation upon the State of accomplishing certain positive prestations for the benefit of the individual. The State is bound to do nothing which shall be an infringement of the rights of the individual; it is bound to guarantee them and to protect them; but the individual cannot demand anything more from it. And so Esmein does not recognize the right of the individual to assistance, the right to instruction, or the right to employment through the State.

"Individual rights," says he, "have one characteristic in common: they limit the rights of the State, but do not impose on it any positive service, any prestation for the benefit of the citizen. The State must abstain from certain infringements for the purpose of leaving individual activity free. But the individual has nothing more to claim in this respect. For this reason we should not class among his rights, as has sometimes been done, the right to assistance, to instruction, and to employment, which each citizen might claim from the State." [20]

That is clear; but the following is less so. M. Esmein continues in this manner: "The obligation of furnishing assistance to all, that is, instruction or work, might at most be considered as a duty of the State." This statement is not very clear; for, in fact, if the

[19] Esmein, Droit constitutionnel, sixth edition, published by M. Joseph Barthélemy, 1914, pp. 29 and 30.

[20] Esmein, *l. c.* p. 348.

State is under a duty of furnishing assistance, instruction, and employment, there exists a corresponding right in the individual to demand these things. Does M. Esmein mean by this that it is simply a moral duty binding on the State and not a legal obligation? This makes Esmein still less comprehensible; as I understand him, in fact, there is a moral duty binding on the individuals who are in power. But I cannot understand, by that, a moral duty upon the State, since according to M. Esmein the State is a juridical person, and consequently can have only legal obligations implying corresponding rights.

Undue emphasis need not be given this matter, but we must recognize that Esmein places himself in formal contradiction to the general but decided tendency of modern positive legislation found first of all in France. Everyone recognizes today that if there is not a right to employment, at least there exists the right to assistance and to instruction.

VI

Even though Esmein energetically affirms that the sovereignty of the State is narrowly limited by the individual natural rights of the person, he refuses to recognize in the individual the right to resist oppression. Not only does he refuse the right to aggressive resistance and the right to defensive resistance, but he also refuses even the right of passive resistance. Recalling that the Declarations of Rights of 1789 and 1793 had proclaimed that the right of resistance to oppression was the consequence of the other rights of man, the learned and lamented professor writes: "These are errors belonging to the past; the syndical right itself is less dangerous." [21]

By syndical right M. Esmein simply means freedom of association concerning which he has ideas quite contrary to mine, which there is no occasion for discussing here. Esmein tersely protests against every pretended right of passive and defensive resistance in the following: "Another error," says he, "is that which consists in proclaiming that the citizen, without rising up in violence, can not only refuse to recognize the laws of his country which offend his conscience but refuse also to submit to them. The first duty of the citizen is to respect the laws of his country, especially in a free country where one can always hope to win over public opinion

[21] Esmein, *l. c.* p. 1108.

and thereby secure abrogation or modification of those laws which are offensive. It had been previously said by Hobbes that those who profess the error pointed out put down human society so far as it is in their power." [22]

I highly regret that Esmein, short of arguments, should have been induced to invoke in favor of his thesis the opinion of the theorist *par excellence* of political absolutism. We have previously seen [23] with what force and skilful argumentation Benjamin Constant established the inviolable right of the individual to refuse obedience to laws contrary to right.

It goes without saying that Esmein, rejecting passive and defensive resistance, condemns *a fortiori* aggressive resistance. "It is difficult," says he, "to conceive of a maxim more dissolvent to political society." [24]

Whatever be the opinion of Esmein on these particular points, the fact remains that the contemporary French jurisconsult, best representative of the metaphysical doctrine of the State, constructs a juridical State having for its basis essentially this principle, namely, that sovereignty is limited by the natural rights of the individual, which rights determine at the same time the course and the extent of the action of the State. Benjamin Constant went the whole way; Esmein only part way. But in its entirety, the doctrine is the same and its juridical construction rests on the same foundation.

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[22] Esmein, *l. c.* p. 1109.

[23] *Supra*, chap. VI, section IV.

[24] Esmein, *l. c.* p. 1109.

CHAPTER VII

THE GERMAN DOCTRINE OF PUBLIC LAW AND THE METAPHYSICAL CONCEPTION OF THE STATE

THE political doctrines of Kant and of Hegel, previously studied,[1] were really juridical doctrines. But neither one nor the other was a jurist by profession. They had indicated the bases for a juridical theory of the State, but they did not work it out, and had they cared to do so, they could not have constructed such a theory. Not until the last part of the nineteenth century do we find in the legal literature of Germany a true juridical theory of the State. Up to that time public law had not completely divorced itself either from politics or moral philosophy. And with respect to public law the works of the professional jurists contain scarcely a practical explanation of the rules of positive law so far as the political and administrative organization is concerned.

The first German jurisconsult who attempted to construct a juridical theory of the State is Gerber, whose work entitled *Grundzüge des deutschen Staatsrechts* appeared in 1865. The third and last edition was published in 1880. Gerber's book had an immense following. He was the first in fact clearly to formulate the idea that the State is a juridical person distinct at the same time from the prince holding the power and the subjects of this power; and that it is this person, the State, which is invested with public power conceived as subjective right. This idea was destined to become the fundamental conception underlying later attempts to formulate the whole juridical theory of the State — the theory which finds its full development in the work of one quite worthy of admiration, namely, Professor Georg Jellinek.

I

In the preface of his book, Gerber explains that a number of the German publicists of his time see in the principles underlying modern political constitutions not so much juridical principles as

[1] *Supra*, chaps. III, IV, and V.

principles of politics and of political philosophy; that others let themselves be dominated by the conception of the ancient German public law, which created a patrimonial right of the prince out of the public power just as if the new constitutional right was the final product of the ancient territorial right.[2]

This ancient conception of public law, the patrimonial conception of the State, or conception of the princely State, was the general conception in all Europe in the seventeenth and eighteenth centuries. It disappeared in France with the revolution. But it subsisted in Germany not only in the minds of the princes but even in the writings of the jurists. Gerber, on the contrary, supposes the State to be a juridical person, distinct from princes; he makes such juridical person subject to the law; he affirms that it is the State, as such, which is endowed with the power of issuing commands, that is, endowed with sovereignty. The State is through and through an organized juridical person of which the prince and even the nation are only the organs.

The following is an important passage of the book in which the direct influence of Hegel appears very clearly, but of Hegel translated by a jurist: "In the State a nation receives the juridical ordering of its collective life. In the State the people become a complete moral unit (*sittlich*) with juridical recognition and value. In the State a people seek and find the most essential means for the protection and satisfaction of their collective interests. In it they receive organization which makes possible the use of all moral forces for the common good. The State is the juridical form for the collective life of a people, and this juridical form is part of the original and elementary type of the moral order (*sittlichen*) of humanity. Through the natural observation of a people, unified in the State, the idea of an organism results, that is to say, of a grouping whereby each person finds the place best fitted for him in contributing to the collective end. The fact that the people have arrived at the point of having a collective juridical conscience and of having the capacity of willing, in other words, that in the State the people find their juridical personality, is first perceived by means of this juridical conception of the State. The State in so far as it protects and brings into prominence all the forces of the people directed toward the moral realization of the common good

[2] Gerber, Grundzüge des deutschen Staatsrechts, Preface to the first edition, 1865.

is the highest juridical personality which is known to the juridical order. Its capacity of willing is of the widest scope which law can create. The power of the will of the State is the power to command; it is called the power of the State. (*Die Willensmacht des Staats ist die Macht zu herrschen; sie heisst Staatsgewalt.*)" [3]

In the following passage from Gerber, Hegelian inspiration again appears very clearly: "The power of the State is the power of a willing organism morally conceived as a person. It is not the artificial and mechanical assembling of a certain number of individual wills, but the moral collective force of the people conscious of itself. Its existence or its nature does not depend upon a certain determination and is not created by a deliberate act; but in that it is the most powerful social form of humanity, it is a natural force which is originally contained in the State. The juridical manifestation of the power of the State is that of issuing commands. That means a power of willing, efficacious for carrying out of duties involved in political union, and to which all the people and all members thereof are subordinated. Its effectiveness even in regard to apparent internal forces rests on this, that it is the highest power among the people and that the general conviction of its irresistibility (*Unwiderstehlichkeit*) is established. To be a complete realization of the idea, that is to say, to represent the moral collective will of the people truly and completely, the power of the State must have this characteristic, namely, that it must not receive the determinant motives of its action from a superior power existing outside of itself, but that it find such motives solely within itself. In other words, it must be sovereign." [4]

But has the State thus posited, the State which is the highest realization of the moral good, the State as the most exalted juridical personality, the State which possesses the power of issuing commands (*herrschen*), that is, an unconditioned and irresistible power — has the State, thus conceived, a juridical power without limitations, or, on the contrary, is it a power limited by law? Gerber did not overlook the question, and credit is due him for maintaining in unambiguous language that the power of the State has limits beyond which it cannot go; limits imposed on it by law. The jurisconsult was able to resist the influence of the Hegelian doctrine,

[3] Gerber, Grundzüge des deutschen Staatsrechts, third edition, 1880, pp. 1 to 3.

[4] Gerber, *l. c.* pp. 19 to 21.

which was then so strong, and outlined in clearest language the juridical limitations upon the action of the State. But as we shall see he remained somewhat isolated in this respect so far as German doctrine is concerned. The jurists who followed him borrowed his concept of the juridical personality of the State, which juridically may be easily construed to be unlimited political power; but they have well guarded themselves against accepting that part of his doctrine which proves the existence of limitation upon the powers of the State.

Gerber's idea appears even in the title of one of the chapters in his book, *Limitations upon the Power of the State.* He distinguishes therein between general and particular limitations.[5] But the principle underlying such limitations and according to which they must be established is not set forth very clearly. Gerber, however, seems to admit certainly that the powers of the State are limited by a right (*un droit*) anterior and superior to the State. The limitation unquestionably in his mind is one juridical in character, since he reiterates that the State is a juridical person, that its will has a juridical capacity. Consequently, if one speaks of limiting the activity of this will, the only question can be one of a limitation juridical or legal in character. Gerber's mind was certainly dominated by the individualistic conception, recognizing in the character of man, as such, natural rights anterior and superior to the State and coming to limit its action.

Along this line of thought the following passage is, as a matter of fact, the most remarkable in Gerber's works: "The power of the State is not an absolute will. It is to serve only the purposes of the State; it must exist for it and it only. In it are contained the natural limits with respect to the domain of action allowed to the State. The power of the State is dynamically the highest power residing in the people; but juridically it exists only within the sphere of its own ends, or, in other words, only within the sphere of its juridical existence is the power of the State supreme in its decrees." [6]

Gerber goes on to observe the difficulties attendant upon determining even in a general way the precise limits circumscribing the action of the State, and points out that, although ideas in this respect vary according to peoples, "there is, nevertheless, a series

[5] Gerber, *l. c.* pp. 31 *et seq.*

[6] Gerber, *l. c.* p. 31.

of interests in the life of all peoples concerning which these limitations upon the power of the State have a wholly particularized importance. The question has reference to those manifestations of life and those situations in which an intervention in the form of tutelage or constraint by the State would appear as infringement of the moral dignity of the people and especially as an obstacle to its free development." [7] It is worthy of notice that the jurisconsult also declares that the State cannot in any way interfere with the freedom of public opinion, of religious belief, of education; nor interfere in any way with one's choice of profession or with the freedom of the press.[8]

In this respect Gerber's doctrine, if it is not the individualistic doctrine *in toto*, comes singularly close to it.

II

Gerber was the precursor of contemporary German doctrines of public law growing out of the metaphysical conception of the State. These doctrines, so interrelated in German legal literature, have found their most complete and exact expression in the comprehensive and, indeed, remarkable work of Professor Jellinek. Jellinek was for a few years *Privatdocent* in Vienna. He was called to the university of Heidelberg where he taught from 1887 to 1911. He was stricken and died in 1911 in the prime of intellectual vigor. In public law he stands unquestionably as the most representative jurist in the Germany of today. His two most characteristic and important works are: *System der subjektiven öffentlichen Rechte*, first edition 1892, and *Allgemeine Staatslehre*, first edition 1900. The work of Jellinek is, as it were, a synthesis of the movement of absolutist ideas proceeding from Kant and Hegel, having for their inspiration the thought that the State is a great moral personality, which realizes and alone can realize the moral idea, and in consequence may impose its will without reserve and without restriction. But, at the same time an ingenious though sterile effort appears, having for its purpose reconciliation of this omnipotence of the State with public law upon which it has been superimposed, in order to explain how the modern State, while being all powerful, is at the same time a State under law, a *Rechtsstaat*.

[7] Gerber, *l. c.* p. 33.

[8] Gerber, *l. c.* pp. 36 and 37.

The German doctrine of public law in that stage of development to which it had been raised by Jellinek, which has not been surpassed since his death, is made up of the four following elements:

First: The State is premised as such. It exists. It is a being distinct from the nation, distinct from the individuals, though it is, to be sure, a national corporation, and the nation is the aggregate of the individuals.

Second: The State is a legal person, capable of rights and subject of the public power, the latter being a subjective right of the State. Jellinek calls it the *Herrschaft.* It is an unrestricted and irresistible power. Sovereignty is a characteristic of the public power of the State, a characteristic which according to Jellinek, it may not but in most cases does possess.

Third: This sovereign public power is the right which the State possesses of never circumscribing its own action except by its own will, and consequently of determining according to its own understanding the extent of its action and that of the individuals which are subordinated to it; and, furthermore, of creating as a result thereof objective rights by its own will without the intervention of other wills directing or controlling its action.

Fourth: But the sovereign State, invested with the *Herrschaft,* can voluntarily submit itself to law, it can be subject to a self-imposed limitation. Such auto-limitations are determined only by its own will. It thus remains sovereign after such limitations upon its own power. The auto-limitation is an auto-determination. By voluntarily accepting obligations growing out of a jural principle which it has itself created or resulting from a contract to which it has consented, it submits itself to law, it limits its action by law; it is legally bound. But, in spite of that, its sovereign *Herrschaft* retains its entirety, since its will to submit itself to right, to the law, to a contract, has been determined only by itself. The modern State is thus a *Rechtstaat,* a State under law.

Can any one fail to see that we have here only a sophistry? This auto-limitation of the State is illusory. If the State in fact is in submission to law only because it so desires, only when it so desires, and only to the extent that it so desires, it is not in reality under obligation to law at all. The State, it is said, is subjected to the laws which it has made, in so far as it maintains them; to the treaties which it has signed, so long as it pleases to abide by them.

But this does no more than justify in advance all arbitrary, and in fact tyrannical, acts as well as all international usurpations by giving them the appearance of having juridical value. We shall see later that Jellinek is unabashed by such consequences.

III

The premise for the whole doctrine is borrowed from Gerber; the State taken as such is a subject of right. It is the subject of that subjective right, the commanding power, the *Herrschaft.* The following is the definition given by Jellinek: "As a legal conception, the State is the corporation of a people, established on certain territory and invested with an original power of issuing commands (*Herrschenmacht*), or to use a well-known expression, a territorial corporation invested with an original power of issuing commands." [9]

The commanding power with which the State is invested is an irresistible power (*unwiderstehliche*). The State may formulate unconditional decrees, and can exercise constraint to the fullest extent. "*Herrschen* signifies the right to issue commands unconditional in character and to be able to exercise constraint to the fullest extent." [10]

Such is the power of the State (*Staatsgewalt*). It is the criterion by which the power of the State is distinguished from all other powers. In the countries where the power of *herrschen* is granted to a corporation or to an individual member of the State, the acquisition is not one of proper and original title, but the result of a concession: it is derived from a power of the State, which alone possesses complete and original title to the power of *herrschen.*[11]

In these affirmations formulated by Jellinek the direct influence of Hegel can be seen. The name of the celebrated philosopher, moreover, is often found in his writings. But Jellinek owed it to himself to endeavor to find a basis for public law. In the transcendency of its developments, in the vague and finely spun abstractions of his formulas, Hegel was able to avoid the problem. A jurist by profession like Jellinek was not able to do so. He had to explain at any cost how the State comes to be in submission to law, even

[9] Jellinek, Allgemeine Staatslehre, 1900, p. 161.

[10] Jellinek, *l. c.* p. 388.

[11] Jellinek, *l. c.* pp. 389 and 390.

though it is by definition a will which is self-determinate, an unconditioned and irresistible power. It is by means of his ingenious theory of auto-limitation that he believed he had solved the problem.

IV

Jellinek, as a matter of fact, is not the originator of the theory; he merely developed it and stated it more precisely. It was thought out by Jhering, one of the most vigorous and supple minds of the nineteenth century. It is set forth in the first volume of his book entitled *Der Zweck im Recht*, one of the most interesting books in legal literature ever written in any country, a book which contains an extremely realistic philosophy but one, it must be admitted, which is not only deceptive, but places law on very fragile foundations.[12]

For Jhering the will is the primordial fact. Will is the true creative force in the world, meaning by force the source of causality. As in God this force is will, so it is in man.

This will, like everything else in the world, is in subjection to a law. But the law by which it is governed is a law of purpose and not one of cause. It is the end which determines the manifestations of will, which determines at one and the same time its value and its effects.

The ends, therefore, which determine the will are personal in their nature, and the means by which the will attains the realization of its desires is constraint (*der Zwang*). There are wills determined by egoistic ends and there are wills which impose themselves by constraint. In other words, there is egoism and force. There is nothing else in the world.

But if this be so, how can nature go on in its eternal course of becoming which brings it constantly nearer the absolute idea, that is, God? How has law come to be formed? In spite of the originality and power of his mind, it can be easily seen that Jhering did not withstand the influence of Hegelianism.

Jhering answers the question thus: Nature has taken egoism and constraint into its service. The State, following the example

[12] Jhering, Der Zweck im Recht, I, 1877. Volume two is not accessible in French. The first volume was poorly translated into French, in 1901, by M. Meulenaere under the title, *L'évolution du droit*. [There is an English translation of volume one, under the title, Law as Means to an End. — Translator.]

of nature, has also taken egoism and force into its service, and has created the law out of it. "How," writes Jhering, "can the world exist in egoism? Because it takes it into its employ, and pays it the salary which it demands. Egoism becomes interested in nature's purposes; nature thereby secures its participation. This is the sacred maxim by which nature as well as humanity and the particular individual take possession of egoism to secure their own ends." [13]

Then what is the State according to Jhering? It is society in so far as society holds the power of constraining, of regulating, and of disciplining. The sum of the rules in accordance with which the State should put constraint in motion constitutes the law, which is thus simply the discipline of constraint. Consequently, the organization of the power of constraint is the very reason for the existence of the State. It contains two elements: (1) the establishment of the external mechanism of its power; (2) the discipline of its action. The mode of accomplishing the first is the power of the State. The mode of accomplishing the second is the law. The two notions are conditioned upon each other; the power of the State needs the law; the law needs the power of the State.

The character of the power of the State is completely moulded by the ends for which the State is formed. It is a supreme power superior to every other will on any determinate territory. This power is not only a power by virtue of right; in order to have a State, it is and must be a material power (*Macht*), that is to say, power in fact superior to all other authority existing in the territory in question. All other conditions in respect of the State have their security in but one condition, namely, that there must be a supreme material power (*Macht*).

"Before this condition is fulfilled," says Jhering, "all the others are anticipated; for, in order to fulfill the condition, the State must exist; and it exists only when the question of power is solved. . . . The absence of material power (*Macht*) is the mortal sin of the State for which there is no forgiveness, a sin which society neither pardons nor endures. A state without material power of constraint is a contradiction in itself. Nations in the past have tolerated absolute abuse of the power of the State, the lash of Attila, the frenzy of Roman emperors. They have often celebrated as heroes

[13] Jhering, *l. c.* p. 38.

tyrants at whose feet they found themselves in the dust — drunken and satiated. Forgetting that they themselves were the first victims, they have supported such a human power when, like the whirlwind, it was being used to overthrow everything before it. Even in a state of frenzy, despotism remains a political form; and therefore a mechanism of the social power. But anarchy, that is to say, the absence of the power of constraint, is not even in form a State; it is an anti-social situation, the destruction, the annihilation of society. Whoever puts an end to it by any means whatsoever, by the sword or by fire, whether he be a national usurper or a conquering foreigner, renders a service to society; he is a savior and benefactor, because the most unbearable kind of State is always better than its entire absence. If a people find it difficult to pass from a state of barbarism to a political order, there is need of an iron hand to accustom them to education and to obedience. The transition always entails despotism which sets up against the arbitrary power of anarchy the arbitrary power of the State." [14]

This long passage has been given in full because it is peculiarly characteristic. In it the immediate and direct influence of Hegel can be seen. It is also easy to see the consequences which a government, devoid of scruples and desirous of conquests, can deduce from such maxims.

V

The State being thus defined as the power of organized constraint, what is law? It is, answers Jhering, the sum of rules of constraint applied within the State. The definition is made up of two elements: the rule (*Norm*) and its realization by means of constraint (*Zwang*).

Only standards established by society and having an enforcing agency behind them can be called jural principles (*les règles de droit*). Then, according to Jhering, since the State has by definition a monopoly of constraint within a given territory, only those principles which have behind them the enforcing agency, the State, are jural principles (*les règles de droit*). Consequently, jural principles are those which are clothed with such characteristics by the State. In other words, the State alone creates the law.[15]

But if the State creates the law, if only the principle which the

[14] Jhering, Der Zweck im Recht, 1880, p. 311.

[15] Jhering, *l. c.* p. 318.

State brings into execution by enforcement is a jural principle, the State cannot be subjected to law and limited by law; there can be no public law. Very well, answers Jhering: How can the result be otherwise? How can the constraining power of the State be subjected to law and limited by law? How does it elevate itself to the position of right and law (*du droit*)? By subjecting itself to a rule, says Jhering, by auto-limitation.

"It is necessary," he writes, "that the State be bound by law. Only by such means can the dangers in the application of the rule be swept away; only thus can equality, security, and the legitimacy of the law appear in place of arbitrary action. That is what is meant in our language by the word *Rechtsordnung*, and that is what we have in mind when we speak of a power (*Herrschaft*) of right or legal power. That is what we ask of law when we wish it to correspond to the notion we have of it, to the notion of a right — the functions of the State under law (*Rechtsstaat*). Right (*le droit*) is in the full sense of the word the force of the rule of law (*de la loi*) reciprocally obligatory, the proper subordination of the power of the State to the law which it has created." [16]

Thus, the State is subjected to law; it is a *Rechtsstaat*. But it is subjected to the law which it creates itself. It submits itself voluntarily to the law which it enacts itself; there is not, nor can there be for the State, any other juridical dependence than this. What motives, then, can bring the State, which has a monopoly of the constraining powers, which is by definition an irresistible force, and which, consequently, has nothing to fear, thus to submit itself to the ways of justice (*la voie du droit*) and to subject itself willingly to the law which it has itself created?

The following is Jhering's answer to the question: "The motive which impels the State to do so is identical with that which leads man to control himself, namely, egoism and personal interest. The conquest of one's self finds its reward in itself. But to understand it, man needs experience and discretion. . . . Man needs discernment to profit by the lessons of experience and moral force to appreciate them. When these two conditions concur, when the power of the State is conceived as possessing discernment and moral force, the problem is solved. The power of the State subjects itself to law, because it is convinced that its own interest is furthered

[16] Jhering, *l. c.* p. 344.

thereby. Only at the point where the power of the State finds itself observing its own commands does it acquire real authority. Only where right and law exist can the national patrimony prosper, can commerce and industry develop, can the moral and intellectual force of the people acquire its highest development."

Jhering concludes with the following proposition so often quoted: "Right and law (*le droit*) is the settled policy of force; not the policy of the moment or the policy of passion and of passing interests, but that broad and far-sighted policy, the policy of the future and of the end." [17]

In short, according to this doctrine, there can be a jural principle only when it obtains the sanction of the State. The State alone creates right and law (*le droit*). The State is subordinated to right and law (*le droit*), because it places itself in submission to it voluntarily; it is subordinated to right and law (*le droit*) only to the extent that it so desires. It submits to it through egoism, through knowledge of its own interest. It limits its authority by law because of the good that will result therefrom, because experience has proved that in thus limiting its authority by law obedience to its action is more easily maintained, and its position is more completely assured.

One can easily see how fragile such a limitation is, how insecure a basis it affords for public law. Jhering himself, however, seems to have perfectly understood it. Led, nevertheless, into asking himself whether the State is always bound to respect the law that it has made, he thus answers: "Every one, from the point of view of his own natural feeling says no. But the question here is one of scientifically justifying the opposite solution. Such solution rests on this consideration, namely, that right and law (*le droit*) is not an end in itself, but only a means of attaining ends. The final end, then, of the State as of right and law is the safeguarding and the conservation of the vital elements of society. Law exists because of society and not society because of law. If the extraordinary situation arose whereby the State, with its power, found itself under obligation, in the alternative, of sacrificing either law or society, it would not only be authorized but obliged to sacrifice law, and to conserve society." [18]

Similar doctrines formulated by one of the great jurists of Ger-

[17] Jhering, *l. c.* pp. 366 and 367.

[18] Jhering, *l. c.* pp. 417 and 418.

many have been the source of all manner of internal despotism, of all manner of external violence and savagery. At the beginning of the war, M. Bethmann-Hollweg, Chancellor of the German Empire, made the statement to M. Goschen, the English ambassador, that international treaties were scraps of paper.[19] He proclaimed in the Reichstag that necessity is bound by no law.[20] He could have substantiated his statement only too well by the teachings of the great jurist, Jhering.

It is fitting to say, however, that Jhering believed that violation of law by the State is something quite undesirable; and that positive legislation should spare the power of the State as far as possible, and that the law-giver may do this by making provision for necessity in the law itself, as certain modern laws and constitutions have done.

VI

This doctrine of auto-limitation of the State, formulated for the first time as far as I know by Jhering, Jellinek made his own. He stated it with precision, and he gave it a still more juridical character than Jhering had previously done.

He begins by declaring that jural principles (*les règles de droit*) are characterized by the following three elements by which they may be distinguished from all other principles, namely, legal, moral, or religious: (1) jural principles are principles governing the external conduct of men among one another; (2) they are principles which emanate from recognized or external authority; (3) they are principles whose obligatory force is guaranteed by an external power. All law (*tout droit*) requires as one of its necessary characteristics a force behind it, insuring its application (*Giltigkeit*). A rule takes on its juridical character only when it comes to be enforced. A principle said to be one of right and law, which as yet has not been enforced or has ceased to be enforced, is not really a jural principle.

In Jellinek's theory, nevertheless, in order to have a jural principle a sanction enforced by constraint through the State is unnecessary. On this point he certainly differs with Jhering, according to whom, as we have seen (*supra*, section IV), there is in truth

[19] The English Blue Book, 1914, p. 78.

[20] Journal "Le Temps," August 6, 1914.

a jural principle only when it is sanctioned by the constraining power of the State. In order to have a jural principle, it is sufficient, according to Jellinek, that there should be some guarantees in respect of its application, guarantees which more often consist in the intervention of the force of the State, but which may merely consist of something else, as, for example, that found in the force of public opinion, in the general organization of the State. If this is not admitted, says the jurisconsult, we should be obliged to admit the non-juridical character of most of the rules of international law and of many rules of public internal law, all sanction for which, because of their very nature, is impossible. They are, nevertheless, jural principles because they are accompanied by guarantees, and often powerful guarantees, to insure their execution.

Jellinek concludes with these words: "It is thus not material constraint (*der Zwang*), but the guarantees — constraint being only a means — that form the essential characteristics of the jural principle. Such principles of right and law are not, to be sure, norms of constraint, but norms to which guarantees are attached." [21]

This being granted, Jellinek formulates the following question: Is the State amenable to a juridical ordinance? Is there a law (*un droit*) for the State? And if there is, what is the foundation of it? The author is thus led into developing a complete theory, sociological in character, with regard to the formation and evolution of law and of the State; a doctrine the details of which one has difficulty in following. I therefore confine my efforts to setting forth its fundamental principles.

The State is originally a situation of fact and one infinitely variable and infinitely changing. This situation, as a fact, progressively transforms itself into a situation of right and law. The political order of things gradually becomes an ordering of a juridical character. Two psychological elements especially aid in bringing about this change. The first element, juridical in its nature, which transforms into norms what existed previously as fact, is the spirit of conservatism. The second element, which gives rise to the conception of right existing over and above positive law and brings about a change in the existing juridical order, is the rational element.[22]

[21] Jellinek, Allgemeine Staatslehre, 1900, pp. 303 to 306.

[22] Jellinek, *l. c.* p. 323.

During the process of formation of States, there are periods in which the political order appears to be merely *de facto* power. On the other hand, the law is never powerful enough to solve the profound conflicts of force that may arise in States. The power of the law has an insurmountable limitation in the very fact that the State exists. The law never has the power of determining in a critical period the course of the State's existence. To disguise striking violations of the jural order, men resorted to the category of right of necessity (*Notrecht*). According to Jellinek, "it is merely a variation of the expression: Force goes before right." The juridical doctrine intervenes later; but it does nothing more than simply rationalize the facts.[23]

Thus, law is formed spontaneously. Even the ordering of the State may spontaneously become a juridical ordering. But another question presents itself which undoubtedly has to do with the first, but which is, nevertheless, a distinct and separate question, namely: What part does the State play in forming the law which is established within its limits? This question, says Jellinek, leads directly back to the old question: Is there a law (*un droit*) superior to the State? [24]

This last question, according to our author, is poorly phrased, or at least phrased in too general a way. In fact, if in speaking of the State we mean the political community as it exists among modern peoples, there is no doubt that a law existed before it; but if we think of the State dynamically, if we define it as being the group invested with a power — the highest known to the epoch — the answer will be altogether different. There can only be law in such a grouping. However imperfect the organization of the human group may be, one always exists. If a non-religious group, however imperfect its organization may be, has no other group above it upon which it depends, it is a State. The State being thus understood in a very general way, it is correct to say that there can be law only in the State, and that there is no law anterior to it.

As the different groups gradually become more extended and more complex, jural principles come into being or take shape within the secondary groups which go to make up the central group. But the central group holding the supreme power, in a word, the

[23] Jellinek, *l. c.* p. 327. [24] Jellinek *l. c.* p. 329.

State, tends to regulate the whole social organization, to become the only source of law; at least the only source for the realization of right. The State has a tendency to bring within its control all the means of force belonging to the collectivities subordinated to it; and this process is consummated when it has reached the point at which the State becomes exclusively possessed of the power of commanding. Thus, if not the whole of the juridical formation, at least the juridical protection ordained by law becomes the affair of the State. The power of judging passes exclusively into the hands of the State and complete jurisdiction is vested in or is conceded to it. "In this way," says Jellinek, "it finally becomes the right of the State to regulate the application of all the law within the four corners of its territory, so much so, that in the modern State all law resolves itself into that created by the State and applied by it." [25]

Undoubtedly, adds the jurisconsult, in modern States many groupings also exist that have a body of law distinct from that of the State: churches, corporations, communities, etc. But the constraint necessary to realize such a body of law belongs exclusively to the State; and, on the other hand, it is exclusively by means of the will of the State that the right of these collectivities can acquire the character of objective right, that is to say, can become a jural principle imposing itself by means of a jurisdictional sanction. "The creation of objective right of a group has today become an affair within the exclusive control of the State." [26]

And so, after this long sociological detour, after discussing the spontaneous formation of law, after affirming the existence of a law anterior to the modern State, Jellinek also arrives at the same general conclusion as that of contemporary German juridical doctrine, namely: In the modern State law is the exclusive creation of the State, and consequently — logically and necessarily — what the State wills is law.

VII

We then find ourselves confronted with the ever recurring question: The command of the State is a principle of right and law binding on the subjects; is it also binding on the State itself?

Many authors, says Jellinek, argue that in starting with the

[25] Jellinek, *l. c.* pp. 330 and 331.

[26] Jellinek, *l. c.* p. 331.

proposition that the State can change all legal principles at will we must necessarily come to this conclusion, that the State cannot be bound by its own public law. These authors declare that in public law there can be and there are commands addressed to the diverse organs of the State, but that there are and can be none addressed directly to the State itself. We must, moreover, recognize that such reasoning imposes itself upon one through the power of irresistible logic, whatever Jellinek may say of it, and whatever efforts he may make to avoid its consequence.

Our jurisconsult, nevertheless, rejects it energetically; he is frightened by it. The result would be, says he, that what appears to be law to a single private individual or to an official would not be law for the State. "Accordingly as we change positions," he writes, "what was previously law for us ceases thereafter to be such. If one looks down from the pinnacle of the State into the depths of the law, one will discern nothing. For the State all law is non-law (*Unrecht*) — a juridical nonentity to which it is a stranger and to which it so remains, but which is imposed upon its subjects and for them is law. Such a proposition," continues our author, "cannot logically be established, except with an inflexible theocracy as a basis. Only a god, only a monarch honored as a god, can make the acts of his inscrutable and ever changing will a law binding on all except himself." [27]

This cannot be so in cases where the State acts according to fixed rules which are incapable of being changed, except in accordance with definite juridical forms. Such a rule contains in itself the subordination of the activity of the State in itself.

But can it be said that the organs of the State are subjected to a jural principle, but not the State? No, says Jellinek; and to understand the answer one must understand the German juridical doctrine, called the juridical theory of the organs of the State, according to which the human individual, acting as juridical organ of a collective juridical person has not, in his character of being an organ, an existence distinct from that of the person of whom he is the organ, any more than one of the sense organs can have a distinct existence apart from the human being.

That being understood, to say that the organs of the State are limited in their action by a jural principle is to say that the

[27] Jellinek, *l. c.* p. 332.

State itself is limited by the rules which it establishes. The activity of the State itself is subordinated to law, since no activity of the State exists other than that which is exercised by means of its organs. Consequently, the State comes within the jurisdiction of its own tribunals, which must apply the law to the State as to private individuals. The State can modify the law, abrogate it, replace it by other law; but as long as the law exists the State is subject to it and the tribunals must so apply it.

Jellinek, like Jhering, declares that this subordination of the State to law brings about a better obedience to the State's commands, that inviolability of the juridical ordering, even in respect of the State, inspires confidence in the minds of individuals. It is thus a condition necessary to the development of culture. It alone creates social confidence without which social intercourse can scarcely rise above its modest beginnings.

In his desire to state precisely the way in which the law is enforced as against the State, Jellinek explains that the mere fact that law is applied by the State is not on its part a discretionary act (*reine Willkür*), but the performance of a true obligation, because in establishing the jural principle by a unilateral act of its will, the State pledges itself to apply the principle and to conform to it.

The jurisconsult even compares this obligation which the State thus assumes with the obligations which may arise for private individuals from their own unilateral acts. I must say that I do not understand this comparison. I do not deny that instances are growing more and more numerous in which the individual may be under obligations because of his unilateral acts; but in such cases he is bound by virtue of a jural principle which is not of his making, which is superior to him, and to which he is subjected; whereas the question to be determined is precisely whether the jural principle, emanating from the State, can be imposed on the State from which it has sprung.

Jellinek seeks to establish what he calls a social-psychological foundation for the subordination of the State to law. In the course of his book, *Allgemeine Staatslehre*, he often expresses this idea — one quite true for that matter — that the underlying element of every rule of law is the belief, deeply impressed on the consciousness of men of an epoch, that such a principle exists as a jural principle

(*un règle de droit*). Then, says he, one certainly can affirm that in the modern State the conviction that the State is bound by its law is being impressed on the minds of men in an ever increasing manner.

In this statement the subordination of the State to law, which itself is derived from the State, is finally placed on a firm footing. And at the same time this subordination of the State to law leaves the irresistible unrestricted power of the State intact, since this subordination is voluntary, in that the State limits its action by its own will, and this remains self determinate. Its will thus preserves intact its essential character, namely, that of being a will which is never determined otherwise than by itself.

VIII

I have already shown several times how fragile is the foundation thus given to public law, how the power of the State, limited by law only because it so wills, resembles an absolute and unlimited power. I have even qualified a similar doctrine as sophistical, because only by an effort in logic can it pretend that the State is bound by law. But for the sake of fairness as well as accuracy it should be said that, after having set forth his doctrine, Jellinek seems to have had scruples. He asks himself, in fact, whether it suffices for the foundation of public law; whether a right truly superior to the State and imposing itself on the State by its own sanction does not after all exist? He seems to think so without expressing, however, his opinions as to the basis and extent of this superior right.

He declares that the creative activity of the law as a function of the State can be juridically limited even where there is a highly developed system of law. There is today, says he, in the law of peoples whose law has reached a high point of development, a foundation apart from all arbitrary legislation. It is the result of the whole historical development of a people. Jellinek cites as an example the principles of penal law, which, says he, are not dependent upon the arbitrary action of the State. A statute, for example, stating that murder is not punishable would be beyond the real power of the legislator. Moreover, if the legislator of a country declared it not punishable, other forces than his own would insure retribution for the murder through means wholly unorganized.

"Accordingly," writes Jellinek, "apart from the formal and purely juridical viewpoint, a distinction may be made in all law between the variable and the constant elements, or at least the elements which change very gradually. These constant elements are recognized, expressly or impliedly, in the constitution, as the embodiment of the character and spirit of the whole civilization of a people and form in this manner a juridical standard for appraising even acts of the will of the State, in form unassailable, as for example, formal laws or the decisions of a sovereign tribunal." [28]

Jellinek tersely adds: "Thus a formal law or valid decision, bound to be carried out and irrevocable, can be appraised as a non-law and not as merely an injustice (*als Unrecht nicht nur als Ungerecht*)." [29]

It is also necessary to note that in a foot-note to his *Allgemeine Staatslehre* (page 332, note 1), Jellinek declares that if the auto-limitation of the State is the only and ultimate juridical basis of its obligations, it is not the primary and real origin of it; and he refers back to page fourteen of his book, *Die rechtliche Natur der Staatenverträge*, in which he says: "The limits fixed for the course of judicial decision are not at all the same as those for the science of law."

All this reveals Jellinek's hesitations and scruples. Taken by itself the sentence just quoted, namely, that a law can be not only an injustice but also a non-law might lead one into believing that Jellinek fully admits the existence of a law superior to the State and of a legal limitation imposing itself generally and rigorously on the State. If we read this proposition, however, in the light of the developments preceding and following it, we cannot give it this meaning. I think that in that passage Jellinek has really no such juridical limitation upon the power of the State in mind; that he holds there is none other than the precarious one resulting from auto-limitation. But he admits that we cannot ignore the fact that there are certain limits beyond which the State cannot historically, morally, and politically go; limits which are determined by science not by the course of judicial decision. It is beyond the course of decision; it is meta-juridical.

The following, which may be found on page thirty-three of his

[28] Jellinek, *l. c.* p. 337.

[29] Jellinek, *ibid.*

Allgemeine Staatslehre, strengthens me in my belief that the foregoing is really the correct interpretation: "In order to solve the question of limiting the powers of the State, we must set aside those insufficient instruments of juridical manoeuvre upon which alone so many have sought to rely in treating the problem. The solution of the question, to use one of my own expressions, is meta-juridical in character."

Finally, what Jellinek says of international law shows clearly that in the depth of his thought there is no true juridical limitation upon the power of the State.

IX

In one of his first works, published in 1880 under the title *Die rechtliche Natur der Staatenverträge*, Jellinek made a study of the basis of international law from the point of view of treaties, and attempted to establish the obligatory character of contracts between States on the theory of auto-limitation. He developed the idea that without doubt, historically, their obligatory character might have originated otherwise; but that juridically no other basis was possible.

In his *Allgemeine Staatslehre* Jellinek again discusses the question of the basis of international law, looking at the matter from a broader point of view. For him the problem of finding a basis for international law is evidently similar in character to that of determining the basis of internal public law. International law is the law which should be applicable to sovereign States in their relations with one another, and, at the same time, can result only from the will of these sovereign States. How can there thus be an obligatory international law for these States when they make this law themselves? "It goes without saying," says Jellinek, "that international law is rejected as non-existent by those who approach the problem from the civilistic standpoint." [30] He means (and he is not wrong) that the greater part of the civilians do not understand the problems of public law, accustomed as they are to see in law only a rule emanating from a superior authority for the regulation of the private relations of its citizens.

What, then, for Jellinek, is the foundation of international law? The same as that of internal public law: the auto-limitation of

[30] Jellinek, *l. c.* p. 338.

the State. States submit themselves voluntarily to the rules of international law and in consequence thereof they become bound by law, but only to the extent of such submission.

But there is another element. International law has also a psychological basis, and, just as such an element can be found in every law, so particularly in respect of internal public law. "If States," writes Jellinek, "recognize international law as being obligatory upon them, then through the psychological nature of all law, a firm basis for international law is thereby established. Now it can no longer be questioned that this recognition on the part of the members of the society of States does exist today." [31]

And just as the individuals that go to make up a nation believe in the existence of internal jural principles as the true source, the ultimate basis, of the internal law of such nation, so is there the belief among the States of which international society is composed, that there is a right among States, that there exist jural principles applicable to members of this society, which are the true foundation of international law. But international law differs from internal public law because the latter is made up of rules of organization and of internal hierarchy, while international law is made up only of rules of co-ordination, since the authorities which establish this law and the subjects of the law obliged by it are the States themselves.

Jellinek believes that the historical evolution of international law has been the same as that of other branches of law. It has been slower; it is less advanced; but it is of the same character. International relations were at first simple situations of fact, which becoming permanent, gave rise to the notion of international rules. The notion of rules led to the notion of law, that is to say, to the notion of rules having behind them a legal obligatory force. In international relations, as in all human relations, there has been transformation of situations of fact into situations of law.

The next stage is the intervention of *Vereinbarungen*, that is to say, agreements between States establishing rules of international law. Internal positive laws are established by a unilateral act of the will of the State. International positive laws are established by *Vereinbarungen*, that is, by the concurrence of the wills of States; by international treaties which are not con-

[31] Jellinek, *l. c.* p. 338.

tracts. Contract gives rise to subjective and concrete obligations. The international *Vereinbarungen* establish a general and permanent objective rule, in a word, a jural principle.

But, says Jellinek, one must guard against founding international law, as does Triepel,[32] exclusively on *Vereinbarungen* formed between States. "Such a conception," says he, "leaves international law as a whole all in the air." The existence of an international juridical order that alone gives sanction to the *Vereinbarungen* cannot in turn be founded itself on a *Vereinbarung*. The birth of the international juridical order cannot in any way be taken as parallel with the original creation of a new public law in the case of the formation of a State, because in such case the men who participate in the new juridical formation are already imbued with the juridical order of the State. They simply apply to the new ordering by analogy jural principles which have already been applied as such, and which by such application only take on a new formal juridical character. But, continues Jellinek, "what is the origin of the belief that the ordering between States is no more than a morality of relation, a morality of the State, an egoism of the State, or any other non-juridical phenomenon? One who would treat international law as so strictly legal cannot like Triepel premise its existence; but must first found its existence in a more penetrating fashion." [33]

To Jellinek, moreover, it is wrong to say that international law is not law, properly so called, because it is not sanctioned by an organized constraint. A principle, to be a jural principle, does not need to be sanctioned by a material organized constraint properly so called. It is only necessary that its execution be guaranteed. According to Jellinek, therefore, the necessary guarantees are not lacking with respect to international law.

Undoubtedly constraint, juridically organized, does not exist as a sanction for international law, since there is no superior power (*Macht*) existing above the States. But this is true with respect to the most important parts of the internal juridical order without their losing, however, the character of jural principle. For a considerable part of international law, there are very important guarantees. "The protection of the individuality of the State," writes Jellinek,

[32] Völkerrecht und Landesrecht, pp. 63 *et seq.*

[33] Jellinek, Allgemeine Staatslehre, p. 339, note 1.

"the jurisdiction and administration dependent on international law, receive guarantees of the highest order from the community of interests of States. What is called international administration functions by means of the strongest guarantees, and one has difficulty in deriving arguments against international law from its practice. The relative strength of States, on the other hand, as well as public opinion which manifests itself in the expressed opinions of statesmen, of parliaments, and of the press, form secondary guarantees for international law, the existence of which cannot be overlooked." [34]

All that is very well. But the jurisconsult does not stop there; and we shall see presently the restrictions placed by him on the application of international law both with respect to its extent and enforceability; restrictions which reduce it to nothingness. This question in fact presents itself: What is to be decided when in fact the rules of international law happen to be in opposition to the immediate interests of the State? Jellinek does not hesitate to answer as follows: "Whenever, upon investigation, international law is found to be in conflict with the existence of the State, the rule of law retires to the back-ground (*tritt hingegen Zurück*), because the State is put higher than any particular rule of law as the study of the relations of internal public law has already taught us. International law exists for States and not States for international law." [35]

We have found in Jhering a similar formula as regards internal public law. Thus, in the opinion of the two jurisconsults, public law is arrested at the point where superior interest of the State begins. They thus legitimize all tyrannical acts within, all acts of brigandage without. The invasion and pillage of Belgium, the burning of Louvain, the massacre of children and women, the torpedoing of the Lusitania, all the abominable crimes which have filled the world with horror were justified in advance by two of the greatest jurisconsults in Germany.

They do not content themselves with simply stating the principle; they attempt to develop it and they seek a scientific basis for it. They reason in this manner: Undoubtedly international law exists; but it evidently contains many gaps, even more than internal public law. Every department of law has in fact portions which

[34] Jellinek, *l. c.* p. 339.

[35] Jellinek, *l. c.* p. 340.

are the outgrowth of compromise of conflicting forces. Law appears only when a conflict has been appeased by a compromise, and the conflicts of force are an essential factor in the formation of a new law. The exterior policy of the State is circumscribed to only a very limited extent as yet by jural principles; and in the relations of States among themselves there is a large domain in which it is power *de facto*, actual force (*faktische Macht*) that decides, and in which conflicts of interests provoke struggles of all kinds, wars, or otherwise.

Such a state of affairs is not to be regretted, says Jellinek. "In fact, if there existed an interstate and especially a super-state ordering which was wholly efficient and decided all conflicts according to pre-established legal principles, it would result in conserving in the modern world and for an indefinite time the infirm, the old, and the survival of the past, thereby rendering all salutary progress impossible." [36]

Here is thus formulated again by a professional jurist the abominable doctrine of war as an instrument of human progress and source of the legal order. Jellinek insists on this and cites examples to support his thesis. Naturally, it is the creation of the German empire following the great wars of the nineteenth century, which, according to him, is the evident demonstration of the doctrine, inasmuch as there has been no happier event in the world's history.

"Let us but think," writes Jellinek, "of the great wars of the second half of the nineteenth century. If these historical conflicts, for the solution of which there existed not a single jural principle, could have been decided according to some jural principle and by any judge whatsoever, the judgment could have only appraised the existing situation in accordance with law. Germany and Italy would still be geographical conceptions, the States of the Balkan peninsula (with the exception of Greece) would still be Turkish provinces; the maladministration of Cuba and of the Philippines would still be in force."

From all this he draws the following conclusion: "National currents and the particular interests of States are so powerful that they have prevented the formation of a true international society. The States are in juxtaposition without organization into a society of States. We can scarcely make exceptions as regards certain

[36] Jellinek, *l. c.* p. 340.

business organizations. The community of States is accordingly in its nature anarchical; and international law since it has for its source unorganized authority, an authority which does not possess the power (*Macht*) of a *Herrscher*, can justly be considered as a law of anarchy (*un droit anarchique*); which brings out at the same time its lack of sanction and its deficiencies." [37]

Such were the negative conclusions as to international law of the greatest publicist and jurisconsult of Germany before the war. But what now remains of even the little which he conceded to international law?

[37] Jellinek, *l. c.* p. 341.

CHAPTER VIII

REALISTIC CONCEPTIONS OF THE STATE IN GERMANY

ALONGSIDE the metaphysical doctrine of the State a very strong current of ideas has been growing in our day in France and Germany tending to deny the juridical personality of the State as distinct from those who govern, and affirming that juridically we are capable of seeing only those who really exercise power. But while in France these realistic doctrines had for their object the establishment of limitations upon the power of the State on a firmer basis than the metaphysical doctrine could, in Germany, on the contrary, they tended above all toward establishing more definitely than ever the absolutism of those who govern.

I

I classify as realistic conceptions all those which reject the idea of the State as a single collective personality having an existence real and distinct from the individuals of whom the society of the State in question is composed and distinct from the individuals who in fact wield political power and force within a given territory; that is, doctrines according to which we must consider, even juridically, only the individuals who in fact hold power, individuals whom we designate as rulers and, regardless of the manner in which they are grouped, whether there be only one — king or emperor — personally monopolizing power by force or whether as in modern States there be several — as chiefs of the State, or parliaments — co-operating in the exercise of powers and carrying them out by force.

Before the Revolution the realistic conception of the State was the dominant conception. It had realized itself as a fact and had logical connection with the feudal conception and with certain institutions of Roman law with which it was combined. Kings and princes were considered as being personally endowed with the right of issuing commands, endowed with a right of sovereignty assimilated almost completely to the right of property as developed

by the Romans. The *imperium* is truly a *dominium*. There had risen a combination of the Roman conception of *imperium*, the commanding power, and of the feudal conception founded on the idea of property as the basis for the power of commanding and also on the strong juridical construction which the Roman jurists had given to *dominium*. From such ideas a system resulted the broad outlines of which should be given here.

The power to issue commands is a property right with which the king taken individually is invested. To use legal terminology, let us call it a subjective right. The subject of this right is the king in whom it resides, and he as an individual transmits it to his heirs, following an order of succession modeled after private succession. Diplomatic agreements are contracts between princes relative to their patrimonial right of power. Princes can cede, concede, or contract away all or any part of their patrimonial power, as every proprietor can give, grant, or make contracts with respect to all or any part of his property. Sovereignty is property of the prince. Such is the patrimonial conception of the State in the fullest sense of those words.

It was realized in fact through the operation of the factors already briefly pointed out. It was advocated in France by such theorists as Bodin in the sixteenth century, Loyseau, at the end of the sixteenth and the beginning of the seventeenth centuries, and Domat and Lebret, in the seventeenth century.[1]

As regards positive law, the legislation of the Revolution substituted the metaphysical conception of national sovereignty for the realistic conception of patrimonial sovereignty of the king.[2]

But the latter did not wholly disappear. Certainly important elements of it with respect to international relations remain. There are international institutions which can be explained only by the survival of patrimonial conceptions, notably lease or pledge of territory and also the constitution of the Congo Free State in 1885 under the sovereignty of Leopold II, King of the Belgians, which has since become a Belgian colony. Furthermore we find that in the nineteenth and twentieth centuries a group of doctrines has arisen which to a certain extent grew out of the ancient patrimonial conception, and vigorously rejected the metaphysical con-

[1] For further details see my book, Les transformations du droit public, 1913, pp. 1 to 11.

[2] *Cf. supra*, chap. I.

ception of the State, seeking to build up a purely realistic juridical conception thereof.

II

All these doctrines are in agreement on one point, namely: it is vain and extra-scientific to affirm that a personal reality, such as the State, exists distinct from the individuals. It is vain, it is extra-scientific to affirm that there is a will of the State of which the chiefs of State, parliaments, officers, are only the representatives or mandataries. We can scientifically affirm only what we observe directly. Again, we verify by observation only the existence of individual wills; we see the individuals in whom power is vested, chiefs of State, representatives, and officers; there can be no question of other wills, except the individual wills of those who, by whatever title, are vested with authority.

Although all realistic doctrines are in agreement as to this negative standpoint, a profound diversity appears among them both with respect to their positive conclusions and the tendencies which have been their inspiration.

Some, on the one hand, have had in fact as their aim restoration of the ancient realistic conception of the patrimonial State in order to place the power of the prince on an even more secure footing than could the metaphysical conception.

They arrive at the conclusion that the power of commanding, the *Herrschaft*, is a subjective right to which the prince personally has title, an absolute unlimited right having no right above it, or beside it, beneath which *a fortiori* not a single right exists.

The other realistic doctrines, on the contrary, have been determined above all by what seemed to their authors the certain impotence of the metaphysical doctrines to establish on solid foundations juridical limitation upon the powers of the State. The champions of realistic doctrines, belonging to this second group, have been especially impressed by the fact that, since Hobbes and Rousseau, the principal advocates of metaphysical doctrines have set forth as their conclusion the total omnipotence of the State; some the omnipotence of the prince, others the omnipotence of the general will, but all the omnipotence of the State; and that these metaphysical doctrines were in fact powerless even in France in many cases to protect the individual against the arbitrariness

and the tyranny of such power. This is the reason why many publicists resolutely reject the metaphysical conception of the State and attempt to place the legal limitation of the power of the State on more secure footing than could the metaphysical doctrine.

As was said at the beginning of this chapter, it is in Germany that realistic doctrines tending to prove the limitless absolutism of the prince have been formulated; in France, on the contrary, publicists have tried to establish a true and stable limitation upon public power solely on the basis of observed facts and through the reality of social life. As between France and Germany the same opposition found in case of the metaphysical doctrines can also be found in the realistic doctrines.

III

The German jurisconsult who best represents the realistic conception of the State at the end of the nineteenth century is unquestionably the Bavarian, Seydel. Professor in the University of Munich and a man of vigorous mind, he published his great treatise on Bavarian public law and a commentary on the constitution of the Empire [3] in which he maintains that the States, members of the German Empire, alone have sovereignty; and that being States, the empire taken in itself has no sovereignty, and is not in reality a State. This theory which clearly reveals the persistent spirit of particularism in Bavaria, at least at the time Seydel was writing, has naturally been severely criticised in Germany. An explanation of Seydel's realistic doctrine cannot be found, as a matter of fact, in these great works, but in a little book published in Würzburg in 1873, soon after the Franco-Prussian War of 1870–71, and entitled *Grundzüge einer allgemeinen Staatslehre.*[4]

In the introduction of this book Seydel declares that realism is the characteristic *par excellence* of our time; and that realism must be injected into the science of law as it has been into the other sciences. "To learn the truth and publish it," he writes, "without any other consideration, is the final end of science; and is accordingly at once the highest form of realism and idealism." [5]

[3] Bayerisches Staatsrecht, two volumes, second edition published in 1913; and Kommentar zur Verfassungsurkunde für das deutsche Reich, second edition, 1897.

[4] His Staatsrechtliche und politische Abhandlungen, 1893 and 1902, might also be consulted.

[5] Seydel, Grundzüge der allegemeinen Staatslehre, 1873, Introduction, p. v.

Consequently, if we care to prevent the science of law from disappearing in the march of the social sciences, paths of approach by which the latter have been developed must be opened. "It must not pursue deceiving images; it must endeavor to lay hold of cold reality. . . . Law has been created by men and for men. It did not come out of the soil as a gift from nature, gathered without effort by lucky hands. It was acquired by strenuous endeavor, by the efforts of a millenium, just like everything else that humanity can call its own." We must go then to juridical realism as did Jhering in his *Der Kampf im Recht*, published in Vienna in 1872. "There remains much to be done in this field; many errors which led to a false juridical idealism must be set aside. There are scarcely any false fictions which have not multiplied themselves, thus closing the paths of truth. This source of error, however, ceases to be dangerous when recognized; and the fact that such a point of view is beginning to make itself clear is truly a fortunate symptom. Not so very long ago, however, it would have been impossible to recognize the truth of the following proposition formulated by Unger:[6] 'fiction is the only proper form of expression for the juridical assimilation and the equality of treatment of different relations in themselves; consequently, we cannot with the help of fictions clarify or justify juridical relations; fictions do not contain a fruitful principle and cannot, moreover, be considered as juridical premises. They are rather, on the contrary, the abbreviated formulas of an order of things previously created and given shape; they are instruments of juridical terminology and not of juridical construction.' These words of Unger," continues Seydel, "are pregnant with meaning, and a train of consequences are connected therewith. This idea in itself sufficed to dissipate the cloud befogging the minds of the followers of Puchta. The subjects of right [*i.e.* legal persons], which do not exist in fact, but are merely a product of the imagination, are doomed to the same fate, including not only the collectivities, concerning which it is said that they are something different from the sum of their parts — that they are not equal to the sum of the needs growing out of the interests of the individual units — but also include many other things which have never existed but have simply been imagined,

[6] System des oesterreichischen allegemeinen Privatrechts, 1864. VI, p. 35.

— many things whose existence is not due to the reality of their being, but simply to imagination." [7]

Every idea in Seydel's statement is profound as well as exact, and is the basis for those doctrines of juridical realism which in many of my own writings I have tried to develop and defend, namely: to banish from the juridical world all such rubbish as fictions and endeavor to understand society as it is by establishing the direct observation of facts.[8]

But although our juridical realism led us to establish a basis which to us seems sound, or at any rate more secure than the individualistic theory, for purposes both of juridically limiting the powers of those who govern and keeping them within narrow limits by the addition of serious guarantees, the realism of Seydel led him to formulate as axiomatic the following inacceptable and singularly dangerous proposition: "There is no law without the *Herrscher*, beneath the *Herrscher*, or alongside the *Herrscher;* there is law only by means of the *Herrscher*." [9] The *Herrscher* is the man or group of men who, within a given territory, have control, as a fact, of the power of issuing commands. Such a statement is an affirmation in unusually forceful terms of the limitless absolutism of those who govern.

IV

But let us see how Seydel deduces this proposition from his juridical realism.

For him the State exists because of the fact that a certain number of men who occupy a definite portion of the earth's surface are united under a superior will. It follows from this that the State is the product of the human will, not the product of a natural power or of an evolution understood in the sense in which a plant, without any will of its own, grows only by virtue of physical laws. The men who create a State, however, desire that it conform to their nature. But such an act of will is none the less a free act, in no way necessary. The particular State is always created by the human will. The idea that the State is an organism is a valueless idea philosophically or scientifically. Such a mode of expressing

[7] Seydel, Grundzüge, 1873, Introduction, pp. vi and vii.

[8] See especially my book, L'État, le droit objectif et la loi positive, Paris, 1901.

[9] Seydel, Grundzüge, p. 14.

one's self rests on an obscure idea, and confounds the impulsion of the human species creating the State with the act of creation that results in its realization.[10]

According to Seydel, therefore, the State is purely a product of the human will. The idea from which the doctrine of the social contract was derived is, he says, very well taken. The application of the juridical notion of contract to matters with which it has no connection is really what is unsound in the doctrine; it is applied to the foundation of society, when in reality law and the notions which result therefrom can exist only after society has come into being.

For Seydel, moreover, the question of the formation of the State by human beings is a matter altogether apart from the science of law. "For," says he, "law exists only through the State. As regards the science of law, the State is simply a question of fact, or as Stein would say, the question of power, as a fact,[11] but certainly not this fact, namely, that the collectivity of men has a separate and independent existence outside and above the collectivity itself. For it is difficult to discern anything like logic in this proposition, especially when we recognize with Stein that the collective existence of the State is identical with the existence and the development of the individuals of which it is composed; that the extent of development of all the citizens is the condition precedent to and measure of development of the State itself." [12]

After having thus affirmed that the State is not a metaphysical entity having a separate existence distinct from the individuals, that a State is simply a question of fact, Seydel goes on to say that such a proposition has consequences of no inconsiderable importance. It leads, says he, to a repudiation of every rational conception of the State; we must not according to such a proposition consider the State in itself, but always particular and determinate States. "The question is not to understand either what the State should be or what are its characteristics *in abstracto*, but to understand better what we as human beings mean by the State; what are the characteristics of all these groupings of men that we are in the habit of designating by the word State." [13]

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[10] Seydel, Grundzüge, pp. 1 and 2.

[11] Stein, Verwaltungslehre, second edition, I, p. 5.

[12] Seydel, Grundzüge, p. 3.

[13] Seydel, *ibid.*

The State is not the only form of union of men among themselves. Numerous intermediary degrees exist between the bestial life of primitive men, in which sexual instinct alone appears as the germ of an exceedingly precarious human society, and the complete union in the form of the State, in which divers and well defined stages are presented as: family community, tribal community, racial community, each one of which is already dominated by a superior will and from which the State is derived by the formation of a new element, namely, its establishment on a definite portion of the earth's surface.

A race and a people united in the State have in common as regards each other the characteristics of union (*Vereinigung*); that is, the characteristics of a being dominated by a supreme will. This supreme will is a logical necessity. In fact, as the separation of men rests on the differences in their wills, their union cannot be realized in any other way than through the suppression of these differences of will. It is not a question of determining how it can be done. "It is sufficient to affirm the logical necessity of the conception that the will, dominating a union of human beings, must be one and indivisible." [14]

According to Seydel, therefore, in order to have a State, two elements are logically necessary: (1) territory and individuals, (2) a supreme will to which the individuals are subjected.

The result of this proposition, he adds, is unquestionably that the State is not the commanding will, nor is it invested with the commanding will. The State is distinct from this will; it is not this will; it is the object created by it. The will of the *Herrscher* is over the State, and its subordination to such will gives to the individual and to the country thus subordinated to it the very character of a State. We call them States only when they are submitted to a *Herrscher:* similarly, we call a thing property only by virtue of its having an owner. Accordingly, thinks Seydel, any line of thought which confounds the State with the commanding will and which attributes a will to the State must, scientifically speaking, be completely rejected. "The State and the *Herrscher*, like property and owner, are two things quite distinct; this is particularly clear since the *Herrscher* can lose his *Herrschaft.*" [15]

The underlying principles of Seydel's realistic doctrine appear to

[14] Seydel, *l. c.* p. 4.

[15] Seydel, *l. c.* p. 5.

be well settled. For him, the State consists of individuals and territory, objects of a commanding and supreme power — a power which is a right of the individual or the individuals who, in fact, have control of such power, and whom he calls the *Herrscher*. The State does not have a will; the State is not a subject of rights; it is an object of the right of power belonging to the *Herrscher*. It is the theory of the State as object, opposed to the theory of Gerber and of Jellinek, namely, that of the State as subject of rights.

Seydel, moreover, expressly and energetically repudiates the conception of the State as a person, which, he says, is as false, as untenable, as the conception of the State as an organism. Both have an unpardonable vice, namely, that they make out of that which is a product of imagination, a simple comparison, a scientific principle of philosophy and of law.[16]

V

So far I agree with Seydel. I agree with him that, in reality, it can be said that a State exists only when in a group of men on defined territory a differentiation can be made between those governing and those governed; and that all such expressions as personality of the State, will of the State, the State as an organism, are vacuous words devoid of meaning. But I now come to that part of Seydel's doctrine in which he attempts to found the unlimited absolutism of the *Herrscher*, against which I protest energetically. Having admitted the preceding, and having recognized the fact that the union of human wills cannot take place except by the establishment of a single will, possessing a supreme commanding power, the problem is then to determine, says Seydel, just how such will, as well as the collectivity of the State, comes into being.

This one supreme will could not have been established by consent of the individuals who are subordinated to it. If in fact the individuals had agreed to submit themselves to a common superior will, such will would have been useless for the reason that such a union, existing apart from and before the State, need not be sought through it. The superior will must then have been created in some other way. Such a will can be only a human will, since on earth no other being but man is gifted with reason and will. The union has

[16] Seydel, *l. c.* p. 5.

thus been brought about because one or several individuals have in fact acquired the supreme commanding power, the *Herrschaft*, as against the social group. Whether only one individual or several individuals acquire the *Herrschaft* makes no difference; the situation in either case is the same. In the case of a plurality of persons governing, there appears as among them the same relation as that which was produced as regards the aggregate collectivity, namely, a difference of wills. This difference of wills is obviated, however, either because the will of the majority imposes itself on the minority as the will of the *Herrscher*, or else because the different individuals in possession of the *Herrschaft* arrive at a common will by an understanding.

"Thus," writes Seydel, "the will to *herrschen* is always and for all time a will over the State (*über Staat*) and not a will of the State (*eine Wille des Staats*); and it is because we have not recognized this relation that we have been led to the chimera of the personality of the State." [17]

But, for Seydel — and here I absolutely reject him and energetically protest against the want of logic and the pitfalls of his doctrine — this will of the *Herrscher*, even though it is only an individual human will, has, nevertheless, a character quite its own, which clearly distinguishes it from ordinary individual wills. The will of the *Herrscher* is by nature a commanding will; it possesses a power of right; it has the right and as we shall see later the unlimited right of imposing itself on other wills. Its manifestations are in the form of orders which require obedience; it has the right of commanding, and it creates law by its commands.

This will of the *Herrscher*, nevertheless, is not by nature an egoistical will. The human will, being that of a reasonable being, is always in pursuit of an end. The State, being a product of the human will, has been constituted with an end in view; and this end can be none other than the common interest of the men united in a State. For that reason, the will of the *Herrscher* in the State is not an egoistical will. The *Herrscher*, as such, does not need to guard individual interests, but merely the common interest of his dependents (*salus populi suprema lex esto*).

Yet, says Seydel, this limitation upon the will of the *Herrscher* is not and cannot be juridical, since the only source of law is to be

[17] Seydel, *l. c.* pp. 7 and 8.

found in this will. It is a simple material limitation existing in the very origin of the *Herrschaft*. As soon as the will of the *Herrscher* exceeds this limitation, becomes egoistical, as soon as it becomes the tyranny of an individual or the domination of a caste, and thus places itself in opposition to the common interests of its subjects, it mistakes the foundation upon which it rests, and places itself in opposition to its own essence. The individuals united in the society of such a State do not find themselves governed any longer in the way States should be governed; society finds itself again facing the pre-political period. The consequence of such contradiction — in which the *Herrscher* sets itself against the very purpose of its authority — leads society to revolution.

Seydel is thus led to outline a sort of theory of revolution. For him revolution is not, in a scientific sense, a violation of law. It is the act by which individuals seek to recover the ancient political union which for the time being has been lost. It is the reconstruction of the foundation for a new juridical and political formation. In the same way the conduct of the *Herrscher*, which has been the cause of the revolution, is not a violation of law; "because the *Herrscher*," says Seydel, "from whom the law is derived, is placed above the law. The *Herrscher* who creates a law without sense does not violate any law, because the source of law is his own will. But he has sinned against the very nature of his *Herrschaft*. Such anti-State acts of the *Herrscher* and the revolution of the people are outside the domain of law." [18]

Thus Seydel is led to declare that we must not confound law and morality. They are not equivalent concepts and can be opposed to each other. It is possible that a juridical command be in opposition to a moral prohibition and that a juridical prohibition be in contradiction to a moral precept. This is a consequence of the absolute nature of the *Herrschaft* and of the essence of law, which is a notion of power (*Machtbegriff*).

Undoubtedly, according to Seydel, the end of law is not to place interest in opposition to moral sentiment, as if they were rivals. But if it does so, law does not cease to be law. For the basis of law is the *Herrschaft;* the basis of the *Herrschaft* is material power. "*Denn der Grund des Rechts ist die Herrschaft; der Grund der Herrschaft ist die Macht.*" [19]

[18] Seydel, *l. c.* p. 9.

[19] Seydel, *l. c.* p. 12.

VI

We have thus reached the most fundamental principle of the doctrine. The omnipotence of the individual or the individuals holding the *Herrschaft* and creating law by their own will is affirmed. This *Herrschaft* is founded on *Macht*, that is to say, on force. The *Herrscher* creates the law by his own will; his orders are always law, however immoral and however irrational they may be; and he can compel obedience by material force.

No attempt is made, moreover, to determine what may be the basis of this power, whether or not it is legitimate, and upon what its legitimacy rests. To Seydel these questions are devoid of interest. The existence of the State is a question of fact; in this respect it does not differ from the *Herrschaft;* and it can and must be considered independently from the cause by which it was established. From the scientific point of view there is no sense in talking about the legitimacy of the *Herrschaft.* More specifically, it does not appear necessary to make it depend on and be derived from the consent of the subjects or from a declarative act of submission. There is even less reason for considering it as founded on a concession, because in such a case a will which is in fact subordinate appears to be superior.

We thus come to the two following propositions wherein, in language forceful and precise and deserving literal translation, the whole doctrine of Seydel is recapitulated: "The *Herrschaft* is simply the existence of power over the State as a fact — a fact from which law is derived. . . . Law is not anterior to the State, but takes the highest position in the State. Law is nothing more than the collection of determinations by which the commanding will (the will of the *Herrscher*) governs that human grouping, the State. The source of law is therefore the will of the *Herrscher.*" [20]

Let us not offer the objection, says Seydel, that the common law does not owe its existence to the will of the *Herrscher.* Customary law itself receives its obligatory force from the will of the *Herrscher.* Custom in itself does not create law; but it becomes common law by the will of the *Herrscher.* If custom lacks the tactit or expressed assent of the *Herrscher*, it cannot of itself become law.

Seydel concludes with these words: "It is thus an uncontro-

[20] Seydel, *l. c.* p. 13.

vertible truth that there is no law without the *Herrscher*, above the *Herrscher*, or on equal footing with the *Herrscher*. A law can exist only through a *Herrscher*." [21]

This formula is at least so clear that no question can arise either as to its extent or its consequences. It is a complete absolute negation of all internal public law. Or, at least, if public law does exist, it is not binding on those having control of the public power. What is called public law is nothing other than a collection of empirical dispositions destined to regulate practical life, for determining the manner in which laws shall be made, the mode of regulating the functioning of the administration and of tribunals. But they are orderings which have no imperative force as regards the *Herrscher* who creates them, who, if he so wished, might not create them, and who can withdraw any of them at his pleasure. There is no law above the *Herrscher*, and whatever he may do, he never violates the law.

VII

We can guess what becomes of international law with such a conception of public law and of governing power. "Between States," Seydel declares expressly, "no juridical command is possible, because the juridical command presupposes a superior will as the source of the law. If such a superior will existed, there would be a world State, and the ideas of the Middle Ages would be realized in the lay *imperium mundi* or the spiritual sovereignty over States." [22]

Granting the premise, all that has been quoted is quite logical. Law, having as its only source the power of the *Herrscher*, in order to have international law a super-political *Herrscher* would be necessary. But none exists; and his existence would be even contrary to the idea of the State, because, in a subordinated State, there would in reality be no *Herrscher*.

Seydel goes even further. He states his ideas in fact even more precisely when he thus writes: "Between States there can be no law; might alone counts as between them; there is therefore no international law. *Zwischen den Staaten kann mithin kein Recht sein; zwischen ihnen gilt nur Gewalt. Es gibt darum kein Völkerrecht.*" [23] Such a statement is at least frank. Seydel continues in this manner:

[21] Seydel, *l. c.* p. 14. [22] Seydel, *l. c.* pp. 31 and 32. [23] Seydel, *l. c.* p. 32.

"*Herrschers* can find it quite opportune for their interests to formulate, to establish certain rules as between themselves; but each one is bound by these rules only in so far as he so wills. Such a rule is evidently not a law. Just as there is no law between States, there is likewise no jurisdiction between them. Conflicts of interests find their last solution in war. Out of the complexity of the foreign relations of the State arises the most important function of the *Herrscher:* to defend the interests of the collectivity not only within but also as against the other *Herrschers.* And since he may be compelled to use physical power as a last resort in preserving such collective interests, such power must be at his disposal at all times. This physical power (*Macht*) resides in the army, which is, therefore, the instrument for the realization by material constraint (*Zwang*) of the will of the *Herrscher* at home and abroad." [24]

Thus, we have the last word of the doctrine: the power of material constraint by the army, within and without, for the realization of the will of the *Herrscher*, who has limitless powers, who creates the law, and who must be irresistible. Such is the teaching of one of the greatest jurisconsults of modern Germany.

VIII

I hasten to say that this doctrine of Seydel's was sharply criticised even in Germany, and particularly by the great jurisconsult, Gierke, professor at the University of Berlin, who in answer to Seydel printed in 1874 in the *Zeitschrift für die gesammte Staatswissenschaften* published at *Tübingen* (page 153) a very remarkable article entitled *Die Grundbegriffe des Staatsrechts und die neuesten Staatstheorien* (the fundamental conceptions of public law and the most recent theories of the State). Gierke insists, and with much eloquence, on the authoritativeness of the law as against the State.

It is impossible here to explain in detail the doctrine of Gierke, a doctrine often obscure, and at any rate singularly complex. It attempts, on the one hand, to reconcile the autonomy of the individual with the omnipotence of the State and, on the other hand, to subordinate the State to law, while maintaining that it is omnipotent. Under the cover of the abstract and obscure

[24] Seydel, *ibid.*

formulas of Gierke, a doctrine appears to be set forth which comes very near being the individualistic doctrine as formulated in the Declaration of the Rights of Man. Here are at any rate the two passages of the article which appear to me most characteristic.

"Since human existence," says Gierke, "is not solved in the life of a species but is at the same time an end in itself, we must recognize the individual and not the State as a primary essence, existing by itself, and finding its ultimate end in itself. Only a part of the individual belongs to the State as a member thereof. The rest of what goes to constitute his being is completely independent of the collective life of the State, and forms the subject matter of his free individuality. The individual being and the being as a member of the State exist like two domains of autonomous life beside each other, either one of which cannot exist without the other, each finding its complement in the other, but each having, nevertheless, a direct end in itself." [25]

If there is a sphere of individual autonomy, Gierke thinks, nevertheless, that the jural principle is essentially social and comes to limit narrowly individual activities. "Social life," he writes, "cannot exist without at the same time having concurrent wills submitted to an imperative rule. Beside the conception of moral duty there arises this conception, namely, that there are in social relations a *Dürfen* within and a *Müssen* without. There is need not only of harmony of wills with themselves, but also of a harmony of all the wills among themselves; and thus arises the conception of law."

That being assumed, the problem of the relations of the State and of law arises. Is the State bound by law? Is law anterior or superior to the State? Gierke puts the question himself, and answers in this manner: "There is between law and the State a reciprocal penetration of a particularly close and intimate nature. The law is innate in the State. Law is no more begotten by the State than the State is begotten by law. But, although each has its own reasons for being, each is developed by the other, each is the complement of the other. . . . Today the State acts as an organ in the formation of law. But for that reason the State does not become either the ultimate source of law or the sole

[25] Gierke, Die Grundbegriffe des Staatsrechts und die neuesten Staatstheorien, Zeitschrift für die gesammte Staatswissenschafte, Tübingen, 1874, p. 306.

organ in its formation. The ultimate source of law resides rather in the common consciousness of a social being. The common belief that something is right needs, for its external realization, materialization by a social expression, as for instance, in a rule of law . . . not unfrequently this expression takes place through and by means of the State, which has for its principal rôle the shaping of the juridical consciousness of the people in the form of law. But social organisms other than the State can formulate law. . . . Juridical life and the life of the State are two independent sides of social life. While power is a rational condition for the State because a State without omnipotence is not a State, it is immaterial, so far as the notion of law is concerned, that there exist for it means of external power; for law without power and without action always remains law." [26]

The sphere of action of the law and that of the State are distinct; but, nevertheless, just as a number of important functions of the State are those concerned in formulating law, so a number of essential functions of law reside in the State. For, on the one hand, the creation of law and the protection afforded thereby are necessary functions of the State and, on the other hand, it is an incontestable as well as rational function of the law to govern and to direct the internal life of the State. Public law is, for Gierke, that part of the law which governs and directs the internal life of the State; and he believes, contrary to Seydel, that a jural principle, based on the juridical consciousness of the individual, imposes itself as a duty on the State and creates for it limitations of a juridical order, determined by the autonomy of the individual.

[26] Gierke, *l. c.* p. 179.

CHAPTER IX

REALISTIC CONCEPTIONS OF THE STATE IN FRANCE

IN France all realistic doctrines, in this respect differing from the German realistic doctrines, have been determined by this end: to establish upon a firmer basis the legal limitation upon the State, and to secure through such limitation more serious guarantees and more efficacious sanctions than the metaphysical doctrine can do, or as a matter of history, has done. All the publicists in France who have tried to construct a realistic theory of the State have been struck by the intrinsic contradictions of the metaphysical conception, which affirms, on the one hand, that the State is a sovereign person, that is, a person having a will determining its own action only by itself, and, on the other hand, that this will has nevertheless juridical limitations upon its action. If this will is sovereign by definition, it is logically impossible to limit it by a standard superior to it. We have seen that all the explanations given which were not vain and sophistical were nevertheless incapable of solving the contradiction. And this is true also of the theory of auto-limitation.

The individualistic doctrine had for its purpose the establishment of the autonomous will of the individual as against that of the State. But either the will of the State can in no way limit the autonomy of the individual with the result that the State ceases to be sovereign and individualism leads logically to anarchy, or else the State can circumscribe the autonomy of the individual will. To remain sovereign, however, it must be within its power to determine in a sovereign manner the extent of the restrictions which it imposes, with the result that the sovereignty of the State becomes limitless. The autonomy of the individual then disappears; an autonomy which the sophistry of Jean Jacques Rousseau, of Kant, and of Hegel has not been able to save.

I

It is in the presence of such inextricable difficulty that the creation of a juridical theory of the State has been attempted in France by completely eliminating the notion of sovereign personality and by formulating a doctrine which will not only explain the imperative force of the law and of other public acts, but which will at the same time construct a solid foundation for the limitation upon the power of those who govern as well as secure a sanction for such limitation.

Realistic doctrines, which for a long time have had few followers in France, have shown marked progress within the last few years. Although they differ in detail, they agree on the following points:

1. The State does not exist as a collective person distinct from the individuals constituting a given society and from the individuals who are in power. That these different social groups, modern nations, great and small, are realities, are facts, can not be denied. To question their reality has never been more difficult than in the epoch through which we now are passing. The individuals constituting such States are united to one another by the very strongest ties, the origin of which must be left to sociologists to determine. At a given moment nearly all the individuals composing the social group of a nation are found to desire the same things, believe in the same future, have identical recollections of the past, hope for the same things, pursue the same ends, and be conscious of the same ideal. But they are, nevertheless, individual intelligences having the same beliefs and thinking as a unit; they are individual wills willing the same things and acting as a unit in their execution; they are human beings, individually suffering and individually trusting in the future. Because a million, ten million, forty million individuals will and do the same things, think and believe the same things, we cannot conclude that for this reason there exists a person one and collective, a national person, organized as a State, having a conscience and a will distinct from those of the individuals. We can speak of the national spirit, of the personality of the nation and of the State; but they are the purest metaphors even though convenient and expressive. They are not expressions of reality scientifically established by observation.

2. Political power is a fact. Such power is vested in those men

who in fact are in possession thereof; in those who are governing. Why is it that they and not others have such political power? Because in fact it is so. It is the result of the political evolution of each nation; and the determination of the causes and the characteristics of the political differentiation in each country must be left to the historical sociologist. Those who govern have, in fact, control of a power which is never legitimate by origin, and which, consequently, never constitutes a right in them. The individual has no rights against those who govern; and, on the other hand, they have no rights against him.

3. The next step is to say this is anarchy; and those are not wanting who have said so. The writer of these lines has, however, been exceedingly well treated, as an anarchist and professor, by his eminent colleague, M. Hauriou.[1] But let us rest content. These realistic doctrines do not lead to anarchy. They teach, in fact, that if the power of those governing is never legitimate by origin, if it is never imposed as such because the will of those who govern is of a different nature from that of those who are governed, yet the power of those who govern is imposed legitimately if it is exercised in conformity to the jural principle (*la règle de droit*), the basis of which must necessarily be determined. Obedience is due to every act of the ruler which conforms to law (*au droit*); such obedience is due not because it is an act of one in authority, but because such act is in accordance with law (*au droit*); it is due only when and to the extent that such act conforms to law (*au droit*).

All French publicists who espouse the realistic conception are in agreement on these different points. It may be perceived how through such a conception the basis for juridical limitation upon the powers of the State is more solid than that given by the metaphysical conception. What is called the will of the State is nothing more or less than an individual will. Those who govern are individuals like any others; and if the will of those who are governed is submitted to law (*au droit*), the will of those who govern, simple individuals like those governed, is also submitted to law (*au droit*).

It is more difficult to explain how rulers can be bound by laws which they have made. Those who govern do not in reality make the law. One of two things happens: either the law, as promulgated, formulates a jural principle (*une règle de droit*) or brings one

[1] Hauriou, Principes de droit public, first edition, 1910, p. 79.

into play, or else such principle is completely alien to law. In the latter case, no obedience is due it. In the former, obedience is due it by all — those who govern as well as those who are governed. It is in this case imperative; not because it contains an order of the governor to the governed, but because it formulates or brings into play a jural principle (*une règle de droit*), which by its very nature is binding on all.

One can also see how, according to this realistic conception of the State, the sanction of such principles imposing themselves on those who govern will be more easily and more efficaciously organized. According to this conception there is no political organ that can pretend to be invested with a sovereign will; and consequently there is no political organ whose decisions can not be the object of an organized redress and brought before a tribunal. In this way the pretension that decrees emanating from parliaments are not subject to question or appeal of any kind because they represent sovereignty breaks down. Certainly we must stop somewhere, because there must always exist a point beyond which there can be no higher authority to which to appeal. A situation will also undoubtedly be reached at which assurance by force of the execution of the decision rendered by such superior authority will be impossible, because such execution would be necessary as against those who govern, who, in fact, have control of the strongest force. But even then there remains the *ultimum remedium* of resistance to oppression in its three forms, so well analyzed by the ancient theologians, namely, passive resistance, defensive resistance, and aggressive resistance — three forms of resistance the legitimacy of which is firmly established according to the realistic conception.

If all the French advocates of the realistic doctrines are in agreement on the preceding points, an important problem arises concerning which it must be admitted there are profound differences of opinion. It is said that the act of those governing is not binding in and of itself, but only by virtue of its conformity to the jural principle (*la règle de droit*). The nature of this jural principle is still to be learned. What is the foundation of it? How can it be recognized? How is it determined? In the answers to these questions extreme differences of opinion are first found. Personally, I think that the realistic conception of the State is alone admissible; but I can not fail to recognize the fact that the problem

of establishing a basis for the principle which renders legitimate and at the same time limits the action of those who govern raises grave difficulties. The principal solutions which have been proposed will be indicated.

II

The politician, publicist, and philosopher who in the first half of the nineteenth century formulated a realistic doctrine of the State with most éclat is Royer-Collard. He was born in 1763 and died in 1845. Royer-Collard was a member of the Council of the Five Hundred. He was appointed professor of the History of Philosophy at the Sorbonne in 1811, and his consummate success there as a teacher secured for him a widespread reputation. Elected deputy in 1827, he remained a member of that body till after 1830. As a Royalist he allied himself with the July Monarchy. In politics he attracted special attention as leader of the party of constitutional theorists (*les Doctrinaires*), who pretended to found their opinions and their votes upon a definite doctrine, founded on immutable principles, scornful of compromises and of arrangements. Royer-Collard wrote very little; his philosophical works are exceedingly few in number.[2] His political doctrine can be found chiefly in his political speeches, particularly in his celebrated speech on the Heredity of the Peerage, delivered in the Chamber of Deputies on October 4, 1831.[3]

In his very searching study of Royer-Collard, Émile Faguet expresses himself in this manner: "Royer-Collard perceived in 1815 that for sixty years the French had but one question to determine when in political discussion, namely: where is sovereignty? . . . Royer-Collard answered in the following manner: The question is badly phrased. You ask: where is sovereignty? I answer: there is no sovereignty. As soon as there is sovereignty, there is despotism; as soon as there is despotism, there is either social death or at least profound organic disorder. To ask, where

[2] Royer-Collard's philosophical writings were printed along with Jouffroy's translation of Reid's works at Paris, 1828–36.

[3] Archives parlementaires, second series, LXX, p. 339 *et seq.* As to Royer-Collard's political doctrines, see de Barante, La vie politique de Royer-Collard, ses discours, ses écrits, second edition; E. Spuller, Royer-Collard, 1893; Émile Faguet, Politiques et moralistes du XIX^{e} siècle, first series; and Nesmes-Desmarets, La doctrine politique de Royer-Collard, 1908.

is sovereignty, is not only to be a despotist but also to declare oneself so to be; it is to have no smack of liberty, no feeling of liberty, no instinct of liberty. That there is no sovereignty is the underlying principle of Royer-Collard's whole political theory." [4]

Êmile Faguet, in the passage quoted, sums up perfectly the idea underlying Royer-Collard's political conceptions, and points out well how he came to form a truly realistic notion of the State. Royer-Collard thinks that so long as the idea of sovereignty is retained the problem of limiting the power of the State by law becomes truly insoluble; that the problem can be solved only by completely discarding the concept of sovereignty; and that sovereignty also leads to despotism, whether it be vested in prince, people, or parliament. But the question as to how those holding power can legitimately impose their wills by force and to what extent they are to be permitted to do so, remains to be explained.

An explanation and solution of the problem was attempted by Royer-Collard in the speech previously mentioned, which he delivered October 4, 1831, before the Chamber of Deputies during the debates over proposed legislation which had for its object the changing of the law with respect to the heredity of the peerage, voted on by both chambers, and enacted on December 29, 1831, with a provision that peers should thereafter be named by the king without restriction as to number, but confined, however, to certain nobilities. The first paragraph of the law reads as follows: "Their rank or dignity (as peers) is conferred upon them for life and is not transmissible by inheritance." This suppression of the heredity of peerage was voted on only after a long and very brilliant discussion in which Royer-Collard, Guizot, and Thiers upheld the inheritance of peerage against the prime minister Casimir Périer, who carried the vote by his authority.

While advocating retention of the rule of inheritable peerage, Royer-Collard found himself constantly confronted with the following objection: the hereditary system, whether it be applicable to the king or to a body, is inconsistent with the principle of national sovereignty. His answer led him into an explanation of the whole theory of public law. "Yes," says he, "nations are sovereign in the sense that they are not possessed like territories, but belong to themselves and have in themselves, by virtue of their own natural

[4] Êmile Faguet, Politiques et moralistes du XIX^e siècle, first series, p. 260.

right, the means of providing for their own conservation and their own salvation; they are sovereign also in the sense that general consent is the only true basis for governments, which, therefore, exist through nations and for nations. But these incontestable truths are rather maxims of morals than principles of government; they rather express the divine sovereignty of reason and of justice than this human and practical sovereignty, that makes laws and administers States. It is that sovereignty which we are looking for. Where can it be found? Is it in public place that it pronounces its oracles? Is it the majority of individuals, the majority of wills, as they happen to be, that is the sovereign?"

Royer-Collard could but answer in the negative, and he puts his answer in terms of singular force. "If that be so," says he, "we must publish it widely: the sovereignty of the people is only a sovereignty of force and the most absolute form of absolute power. Before such a sovereignty, unguided by rule and unlimited in power, without duty and without conscience, there is no constitution, no law, neither good nor evil, either for the past or for the future. . . . But, gentlemen, force is not destined in this manner to exercise a veritable sovereignty on earth. Force constrains; it does not oblige. To oblige is the attribute of quite another sovereignty. The will of one, the will of many, the will of all, remains only force, more or less powerful; to none of these wills, on the sole claim of will, is due either obedience or the least respect." [5]

This is profoundly true. Those who possess power have force — nothing more. Whatever be their origin, they possess nothing more than force, and this force does not bestow upon their will any superior quality permitting it to impose itself upon the governed and commanding their obedience to its impositions. On what condition and to what extent, therefore, can the will of those who govern be imposed on those governed? Royer-Collard thus answers: "When such will manifests itself in conformity to law; when it has for its object the protection of the legitimate interests which have their origin in law."

He explains himself with exceeding clearness in the next passage of his speech, as follows: "Societies," says he, "are not numerical assemblings of individuals and of wills. They have another element

[5] Archives parlementaires, second series, LXX, p. 360.

than number; they have a stronger bond — law, the privilege of humanity, and the legitimate interests which spring from law. Law does not spring from force, but from justice, the sovereign arbiter of interests. Under the auspices of law, societies are formed for the purpose of dethroning force and setting up justice in its place. Notice, gentlemen, that this decomposition, if I may so put it, of all society into rights and interests, substituted for individuals and wills, is at the same time the reason and the sanction of representative government." [6]

In this connection Royer-Collard explains the whole theory of representative government. According to him in this form of government there is representation of interests and of rights and not representation of individuals and of wills. Representative government is the best guarantee that has been found for insuring protection and respect for interests and for rights by the individuals who hold power.

But what are these rights, or rather what is this law, which is the foundation of legitimate interests; what is this law which limits the power of those who govern, and gives validity to their acts when they conform to its precepts? Evidently, according to Royer-Collard, it is natural law, conceived as the rule of conduct for man living in society, an absolute, immutable law revealed to man through natural reason. Such expressions as natural law and human reason often recur in his text. Although Royer-Collard does not express himself very clearly, he must have had in mind as the basis of such law the autonomy of the human person. But what are the obligations which this law imposes on those in power? Are they simply under obligation of protecting the rights and interests of the individual and of not infringing upon them? Or, moreover, does it go so far as to compel those in power to furnish individuals certain positive prestations? These and many similar questions are neither raised nor answered by the great orator.

But after reading his whole discussion a single underlying idea, something very well defined and unassailable, remains, which may be summarized as follows: any affirmation of sovereign personality of the State is false; such a conception can lead only to despotism; liberty is irreconcilable with the notion of sovereignty;

[6] Royer-Collard, *l. c.* p. 360.

the pretended sovereignty of the people is the omnipotence of the majority, which leads perforce to anarchy or to tyranny; those who govern hold the reins of power merely as a fact; their will is not superior to the wills of the governed; such will imposes itself on the latter only when it has conformed to the precepts of law revealed through reason and only to the extent to which it has so conformed.

III

These ideas of Royer-Collard's were not completely abandoned in France during the nineteenth century, even though the metaphysical conception of the State prevailed, generally, among jurists and publicists.

Royer-Collard's ideas, however, recur again, one might almost say in a diffused state, in the writings and speeches of Guizot. Esmein cites a notable passage, borrowed from one of Guizot's pamphlets entitled *Moyens d'opposition*, in which we may read: "Take, for example, men free and independent, strangers to any necessity for internal subordination of one individual to another, alien to any such uniting in a common interest . . . , how does power arise in such an environment? It belongs to the one that makes himself known as the most capable of exercising such power, that is to say, most capable of giving satisfaction with respect to the common interests. . . . As long as no external and violent causes intervene to disturb the spontaneous development of things, the bravest will be the one in command, the able the one who governs. Among men left to themselves, governed only by the laws of their own nature, power is what accompanies and reveals superiority. By making itself recognized, the latter makes itself obeyed. But, it is asked, what will happen in such societies as they become more highly developed and more complicated? When those who in fact control become incapable of understanding and of satisfying the general interest of the people, or when they are no longer willing to take account of such interests but, on the contrary, turn to satisfying their personal interests through the use of their superior position, a struggle is then brought about that can end only by destroying such society or by the displacement of such power. . . . Therein lies the whole secret of revolutions. Therein lies particularly the end, the fundamental principle, of

representative government. It has for its precise purpose the establishment of those natural and legitimate relations existent between society and power, that is to say, the delimitation of such power in law, since there is no such limitation in fact." [7]

This passage, which is not particularly clear, shows pretty well, however, that to Guizot political power is a question of fact, and that those who are in control can legitimately impose their wills only in so far as they understand and desire to satisfy the general interests of the people. Are not the general interests of the people as discussed by Guizot and Royer-Collard's legitimate interests identical?

The ideas of Royer-Collard and of Guizot were also expressed before the National Assembly on February 24, 1875; but they received only ironical reception. The Assembly at the time was occupied with the proposal of M. Raoul Duval to write into the constitutional laws, which were about to be enacted by that body, the principle of popular referendum. On this subject M. Paul Cottin delivered a discourse which the Assembly considered the work of a crank and of little importance. "What then is political power if it is not an authority which is imposed, a superiority which is not questioned, force, as has been said, in the service of law? And what can be its origin if not an imposed authority; force for the most part, often individual force, and sometimes the force of things superior to all particular wills?" [8]

M. Lepère, who was later the keeper of the seals, answered M. Cottin by energetically affirming the dogma of national sovereignty and by referring to his statements as unusual. On M. Lepère saying, "I have not been able to discern just how far M. Cottin has faith in national sovereignty," the latter immediately exclaimed: "I have no faith in national sovereignty. I deny its existence." The official report adds: "Exclamations on the left, laughter on several benches on the right." [9] Thus it may be seen no one in the Assembly seemed to have taken the declarations of M. Cottin with any seriousness. Yet he had done no more than set forth the ideas developed in 1831 by Royer-Collard with the applause of

[7] Cited from Esmein, Droit constitutionnel, sixth edition, 1915, p. 42, note 2. *Cf* Tchernoff, Le parti republicain sous la monarchie de juillet, p. 17.

[8] Annals of the National Assembly of 1871, XXXVI, p. 618.

[9] *Ibid.*, p. 619.

the Chamber and to enunciate the elements of a scientific theory of the State.

In our day these ideas have been taken up and stated more precisely by divers publicists, especially M. Charles Benoist, in his doctrine of social life, and by myself in the theory of social solidarity.

IV

Assuredly the Deputy, M. Charles Benoist, is one of the most authoritative representatives of the realistic conception of the State. He has set forth his ideas in this respect in three very interesting and very suggestive works: *Sophismes politiques de ce temps; La politique;* and *La crise de l'État moderne*, as well as in his reports and speeches to the Chamber of Deputies in favor of proportional representation.[10] The noted representative was struck especially by the existing defects in the actual electoral organization, an organization which gives preponderance to a legal majority, when, on the contrary, a rational political representation should be a proportional representation of opinions and a professional representation of groups. In the presence of such a situation, M. Charles Benoist was led naturally to ask himself what was the significance of the prevailing opinion according to which individual representation is associated with the idea of sovereignty. He conscientiously sought the nature of this sovereignty, but never succeeded in determining it. Such a task, for that matter, was impossible because no such sovereignty actually exists. Such is the genesis of the ideas which led M. Charles Benoist to solutions not very unlike my own. Unlike M. Benoist, however, I have attempted to work them out juridically.

In his book entitled *La crise de l'État moderne*, M. Charles Benoist writes as follows: "Upon closer examination, what is the value of this notion of sovereignty in the modern State? Where does it come from? We can answer that: it is a mystical and theological idea. What is its purpose? We cannot see. In what respect is it a hindrance? That stands out before us." [11]

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[10] See, especially, M. Charles Benoist's report on the several proposals relating to proportional representation in the Journal officiel, documents parlementaires, Chambre 1905, session ordinaire, p. 472.

[11] Charles Benoist, La crise de l'État moderne, p. 31.

M. Charles Benoist again writes as follows: "It is a question of making people see that the notion of sovereignty in itself, whether it applies to princes or to peoples, is an antiquated notion, false in its origin, further falsified by history, and, all things considered, useless, worse than useless — dangerous." [12]

But so far these are only negative propositions. M. Charles Benoist did not stop there. In his substantial little volume, *La politique*, he outlines the principal features of the realistic doctrine of the State, a doctrine which he sums up very clearly in the following passage: "To us it seems wiser and more just to abandon or, as we have been reproached for doing, to throw overboard the very notion of sovereignty; though certainly it is a very venerable and ancient notion, so ancient that it no longer has a place in contemporary political society any more than do the Assyrian or Egyptian gods in our museums . . . or the worm-eaten fetishes of the peoples of Central Africa. . . . Let us leave behind us this corpse from which all warmth of life has gone; and, since politics is the science of social life, let us found our theories only on what is living in society. The idea of sovereignty is false and useless. It may have once been true and may have formerly served fashions which are dead today. But how long is modern Europe going to continue to believe in sovereignty after it can no longer be found in fact? No answer need be given; for there is not at present, nor will there ever be sovereignty among the nations of western Europe. Something else has everywhere arisen in its stead." [13]

Here, then, is the import of the doctrine already explained: there is no sovereignty; there is no commanding and superior will of the State. How, therefore, can the will of those governing impose itself? To complete the theory it is absolutely necessary that this last question be answered. No one could fail to recognize the fact that the solution proposed by M. Charles Benoist is a little indecisive and uncertain. Certainly the idea in the mind of the eminent publicist, similar to Royer-Collard's and our own, is that the will of those who govern can command the obedience of those who are governed only when its manifestations are in conformity to jural principle, and that only by such conformity to law does such will obtain its imperative force.

[12] Charles Benoist, Sophismes politiques de ce temps, p. 141.

[13] Charles Benoist, La politique, pp. 41 and 42.

That such is really M. Charles Benoist's belief is proved by the spirit visibly displayed in all his works, as well as by the proposal made by him in the Chamber of Deputies to create a supreme tribunal for deciding all complaints of citizens with respect to infringements of their rights by laws. On January 28, 1903, M. Charles Benoist along with M. Jules Roche and M. Audiffred signed a petition praying that there be added to the constitutional law of February 25, 1875, an article drawn up as follows: "A supreme court shall be established charged with the determination of all claims by citizens in respect to violations of their constitutional rights by the legislative and the executive power." And on the same date M. Charles Benoist personally suggested a proposition relative "to instituting a supreme court to settle questions relating to infringements of the rights and liberties of citizens." [14]

What, then, is the foundation of these rights which are thus recognized as the rights of citizens, and which at the same time create limitations upon the power of those who govern? On this point M. Charles Benoist's doctrine remains indefinite and uncertain. He introduced the very vague idea of social life, of the social organism; an idea which seems to me incapable of solving the problems involved.

Undoubtedly we can speak of the life of a social body, of the social organism. I, myself, have often used the term; and I do not protest against its use. But we must understand that they are merely convenient metaphorical expressions and not the source of a solution for the problems that are raised in determining the basis of the jural principle which controls the acts of those who govern. The doctrine that likened human societies to living organisms, as exemplified by the works of Herbert Spencer in England, Schäffle in Germany, and R. Worms in France,[15] had at one time no little vogue. Today, with little less unanimity, it is denied. Herbert Spencer and Schäffle themselves declared that their ideas were misapprehended, since they had in mind a mere comparison and not an absolute analogy between societies and living organisms. Thus, Professor Jellinek is quite right in the following remarks:

[14] Journal officiel, documents parlementaires, Chambre 1903, session ordinaire, pp. 95 and 99.

[15] Herbert Spencer, Principes de sociologie, French translation, 1882; Schäffle, Bau und Leben des sozialen Körpers, 1896; R. Worms, Organisme et société, 1896.

"From all this there can be no other result than that the scientific conception of the State gives rise to a new category, quite unlike that of an organism, an autonomous category quite independent of every other analogy." [16]

What, then, is this category, wholly alien to the conception of sovereignty, which, according to M. Charles Benoist, is the substratum of the State and the foundation of law? The eminent representative thus answers: "No. At present sovereignty does not exist, even among the nations of western Europe; but all about us there is something else, something which is not intermittent, which is never arrested, which existed yesterday and will continue to exist tomorrow; which existed before us, is in us, and will be in existence after us; something which is not restrained, but embraces everything, and in which everything is epitomized; something which is not precarious, which can not be suspended by anything or anybody, can not be divided or destroyed, the extent or duration of which can not be measured by us and which is of supreme force and of supreme majesty. This something is national life. Is the nation sovereign? One need not trouble himself to ask; it lives. Physically everyone lives in the nation. Accordingly, everyone has the right to live there politically, provided he has the means and to the extent that he has the means of so doing in obeying the law." [17]

M. Charles Benoist has in mind this idea of national life in that part of his book, *La crise de l'État moderne*, in which he discusses, especially, the organization of suffrage by proportional and professional representation. After showing that the formation of professional groups is always more comprehensive and more coherent, he writes: "Can we not remake and restore by these social realities, by these collective lives of the individual, the frame-work which has so unwisely been broken down? Since it comprehends the whole problem of organizing universal suffrage as well, could we not borrow from them the element of such organization? The individual would lose nothing by it; he would profit thereby, for he would again become a concrete being. The citizen would again become a living person. There would be only one thing

[16] Jellinek, Allgemeine Staatslehre, p. 140.

[17] Charles Benoist, Sophismes politiques de ce temps, p. 161. *Cf.* Charles Benoist, La politique, p. 42.

changed. The whole modern State would be changed thereby for the better. Voting, instead of being an exercise of sovereignty, would be a function of national life. The theory of national life would replace the theory of national sovereignty." [18]

V

All that is very well. But, more precisely, what is this national life? By what law is such life governed? Unquestionably, according to M. Charles Benoist, this national life is not a life identical with those of living, organic individuals. The law regulating this national life is not a law of a biological order, identical with that which presides over the phenomena of life among living individuals as organisms. In using these terms in connection with national life, M. Charles Benoist is unquestionably speaking metaphorically. But metaphors, though very convenient, are singularly dangerous because vacuity of thought may be easily veiled under high sounding metaphorical phrases.

If the law derived from national life is not a biological law, a law of cause, a law establishing the succession of phenomena, it is a normative law (*une loi normative*), a rule of conduct. Such is unquestionably M. Charles Benoist's idea. But he does not explain to us how this rule of conduct, imposing itself on the legislator and the individual, is derived from what he metaphorically calls national life. However, when the question is forcibly thrust upon him, he unwittingly reverts to the idea of sovereignty, to the idea of the commanding power of the State. Thus, he introduces in his work an appearance at least of fundamental contradiction. But let each judge for himself.

After the passage last quoted, M. Charles Benoist adds: "At this point we arrive at a notion — that of the law — which completes and corrects, in the notion of national life, whatever might tend to make it too absolute. Left entirely to themselves all these lives, which are in juxtaposition or are superposed on or linked to one another, are united, are thrown together, in an infinite complexity, and often enter into conflict. Individual lives, the national life, the social life, and the universal life — all these lives so left to themselves would end in anarchy. Something is necessary in

[18] Charles Benoist, La crise de l'État moderne, pp. 32 and 33.

lives politically organized to assign them their proper places, to localize and distinguish them in the process of uniting them; something which will include and maintain them, which will foresee excess and repress it, which will guide and check them. This something is the law. . . . But in order to deny sovereignty let us not deny legal authority, let us not deny the law. On the contrary we proclaim it. And it is this notion, the notion of legal authority which alone corresponds to the actual condition of our political societies, it is this notion of law as well as the notion of national life and inseparable from that notion of life, which we oppose to, which we seek to substitute for, the idea of sovereignty which we abandon and reject." [19]

After reading such a statement one might say to M. Charles Benoist that all such distinction is simply a matter of words, that instead of sovereignty he uses the phrase legal authority. But it is the same thing — identically the same thing. In truth, however, I do not think that such objection can be sustained. This becomes clear from the development of his ideas in the passage following the one previously quoted, the idea underlying which is this: Law emanates from authority; it commands the obedience of all members of the nation, having for its sanction the constraint which those governing can bring into play; not because it emanates from a person having a commanding will superior to theirs — a sovereign will — but because and only in so far as it has for its object the maintenance of order, and only when it conforms to the conditions underlying the development of national life. Such conditions are to be found in morals, in customs, and in public opinion; customs, morals, and public opinion being at once a guarantee "that the law will be neither too abusive nor too arbitrary."

M. Charles Benoist concludes thus: "Let us not speak only of national life. Let us speak of legal authority; but with the understanding, of course, that this authority has the national life as its perpetual source, by which it is perpetually rejuvenated, in which it is continually merged, and from which it derives its ever recurring vigor. Let us speak of these two things together: national life and legal authority. Neither the idea of life, the idea of law, the idea of order, nor the idea of force — none of these are lacking;

[19] Charles Benoist, La politique, pp. 42 and 44.

the legitimate attributes of sovereignty, coercive force, the power of constraining by law, and taxation, will be invested with legitimate authority. As for sovereignty, let us without remorse drop it from our political vocabulary, for time has set about to erase it."[20]

All that is very well: I agree with it entirely; but M. Charles Benoist does not tell us by what means we are to recognize that a law is contrary to or in conformity with right and law and the conditions of national life, for he does not set forth these conditions. He does not say whether there is a jural principle imposed on the legislator, nor what the foundation of such principle is, nor whether he recognizes that the individual has a right against those who govern, nor whether there is an obligation upon the legislator not only to protect individual and collective interests but also to accomplish certain positive prestations for the benefit of the individual.

In a word, M. Charles Benoist talks like a brilliant and well informed publicist, but not like a jurist.

VI

We perceive the weak points of these different realistic doctrines which have just been set forth. The doctrine of solidarity has been proposed as the culmination of these doctrines in that it determines in as precise a way as possible the origin and extent of the jural principle, which creates at the same time a basis for the duties and the powers of those who govern, thereby limiting their action and imposing on them positive obligations. It is not my purpose to set forth this doctrine in detail the elements of which may be found in several of my works, particularly in my book *L'État, le droit objectif et la loi positive*, 1901,[21] to which I beg the reader's permission to refer. I merely wish to call attention to the new elements that the doctrine of solidarity seems to me to have introduced in the realistic theory of the State.

The negation of the sovereign personality of the State is clear, that is, the idea that what constitutes the binding force of decisions made by those who are in power is not the pretended sovereign

[20] Charles Benoist, La politique, p. 156.

[21] See also, Duguit, Traité de droit constitutionnel, 1911, I, pp. 50 *et seq.*, and II, pp. 1 *et seq.*; also Les transformations du droit public, 1913.

character of their will, but the conformity of these decisions to certain standards (*certaines règles*), which in a given epoch have permeated the consciousness of men, and which are imposed both on those governing and those governed: all that has been iterated and affirmed. But this superior principle of right and law (*cette règle supérieure de droit*) was generally founded on recognition of individual rights attributed to man because of his nature, rights which by this title were anterior and superior to society and to the State. The representatives of the French realistic doctrines from Royer-Collard to Charles Benoist have not explained the basis and import of this principle about which, however, they never ceased talking.

The doctrine of solidarity was urged to show that the jural principle (*la règle de droit*) does not rest on the metaphysical and self-contradictory conception of rights of the individual anterior to society but is directly derived from the same elements which constitute the social bond. What are these elements? An analysis which seems decisive has been attempted by M. Durkheim in his excellent book, *La division du travail social*, 1895, many of the detailed solutions of which are quite contestable, but the underlying principles of which seem sound.

In every grouping two elements constitute the social bond; two elements that may appear in infinitely variable forms, but the basis of which, reduced to its simplest terms, is always the same. They are (1) the similarity of needs, which is the basis of solidarity either through mechanical interdependence or through similitude; (2) the difference in needs and in aptitudes which produces and makes necessary an exchange of services, and which founds solidarity either by organic interdependence or by divisions of labor.

Thence is derived the following formula for the jural principle (*la règle de droit*) imposing itself on all the individuals of a social group, both great and small, both strong and weak, as well as the governing and the governed: Do nothing which can possibly infringe upon social interdependence, either through similitude or through division of labor; do all that is within your power, within your given situation and within your aptitudes, to insure and increase social interdependence both by similitude and by division of labor.

The idea I have attempted to convey in these few words I have tried to develop in the works previously cited. Many authors, and some among them the most eminent, have done me the honor of expounding and of criticizing this doctrine.

Of these criticisms some have no bearing on the doctrine. For example M. Esmein says: "Those rights and legitimate interests in which Royer-Collard sees the very foundation of political society, are equivalent to the subjective juridical situation and to the jural principle, which are used by M. Duguit as the foundation for his whole system. . . . As for the jural principle (*la règle de droit*) and especially the subjective juridical situation, they are Germanic abstractions that will be impressed with difficulty upon French minds." [22]

If the notions underlying the jural principle and the subjective juridical situation are borrowed from Royer-Collard, it is difficult, it seems to me, to believe at the same time that they are Germanic inventions. The truth of the matter is that these conceptions are neither borrowed from Royer-Collard nor derived from Germanic doctrines. The notion of the social juridical situation, which is not a subject for development here, is wholly alien to Royer-Collard's doctrine. As for my conception of objective right and of the jural principle (*la règle de droit*), let me say that it is wholly different from the doctrinal conception of rights and of legitimate interests. The latter evidently rested on individual rights determined *a priori* through reason. My affirmation of the jural principle (*la règle de droit*) is based exclusively on a fact, namely, social interdependence, established by observation. The difference is fundamental.

To say, on the other hand, that such conceptions as the jural principle (*la règle de droit*) and the subjective jural situation are Germanic abstractions, that is to say, are inspired by German doctrines, is to commit a material error. I have developed these ideas in a book entitled *L'État, le droit objectif et la loi positive*, published in 1901 and written in answer to Jellinek's famous work entitled *System der subjektiven öffentlichen Rechte*, 1897. I attempted to work out an objectivistic doctrine of the State and of law in opposition to the German doctrine represented by the most illustrious of jurist-publicists then living in Germany — a doctrine

[22] Esmein, Droit constitutionnel, sixth edition, 1914, p. 43.

which is essentially a subjectivistic doctrine. Let me say, moreover, that the authors who are acquainted with the legal literature of Germany, and who do me the honor of reading my works, do not make such a mistake. M. Hauriou, notably wrote as follows: "Meanwhile the tempest of objective law, unchained by M. Duguit, burst forth (*L'État, le droit objectif et la loi positive*, 1901). We know the history of the cyclone. To the impetuous affirmation of the German doctrine that all public law is subjective, M. Duguit answered with a similarly impetuous affirmation that all public law is objective. He found his strength in liberal and constitutional sentiments, because the German doctrine of *Herrschaft* is essentially administrative and anti-liberal." [23]

VII

With respect to the serious objections made to the doctrine of the jural principle founded on the theory of social solidarity, it may be said that, although they are very different in form, in the last analysis they all come to this: In admitting, it is said, that the law is a social standard (*une règle sociale*) and not the power of an individual will, in admitting that social interdependence is the fundamental element of social integration, one is simply admitting a fact. But a fact can not be the foundation of a rule, of a precept of conduct, any more than it can be the basis for a jural principle (*une règle de droit*) or moral principle; and thus, it is said, the whole system gives way.

Out of all that has been written on this matter, I shall confine myself to a citation of the following passage borrowed from an excellent book, which my distinguished colleague Geny, professor in the faculty of law at Nancy, has just published. "If from facts," says he, "we can discern a certain ordering (*un certain ordre*) in the relations of men, we should at least be able to deduce therefrom a rule for the future conduct of humanity, to deduce a standard that ought to be imposed for the purpose of bridling rebellious ideas. M. Duguit, however, pretends to find a basis for this principle in social interdependence or, let us say, more generally, in the very fact of social life." [24]

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[23] Hauriou, Revue générale de droit, 1914, p. 334.

[24] Geny, Science et technique en droit privé positif, Part II, 1915, p. 251.

My answer is that this reasoning is true as regards the moral rule, but that it is not true as regards the jural principle (*la règle de droit*). To establish a rule of morals it is necessary in fact to establish a criterion of good and of evil. The moral rule compels us to do one thing because it is good, and forbids us to do another because it is bad. The rule of morality bases its precept on a certain value inherent in the very act which it commands; and we may maintain that such a rule is not truly imperative, except when the criterion of what is forbidden and of what is commanded is outside the facts and superior to the facts.

To act in conformity to law, on the contrary, is to act in conformity to what is social. The jural principle (*la règle de droit*) says: Do such a thing because it is social; refrain from doing such and such a thing because it is anti-social. A juridical obligation is not an obligation to do what is good in itself but an obligation to do what has a social value, that is, not to do what is anti-social. It finds its proof in the fact that the whole world agrees in recognizing that the criterion of the jural principle is the social reaction which is caused by a violation of the principle; a reaction capable of being socially organized. Let us not say, then, that the jural principle can not be founded on a fact, since it is nothing more than a precept to conform one's self to facts. The fact is the true foundation of the jural principle, if such fact is truly the social, irreducible, and essential fact; and the whole question is resolved into determining whether or not social interdependence is that fact. It seems to us that it can scarcely be contested. Personally, the more I think of it, the more convinced I become. This fact alone is capable of giving to law a foundation at once positive and solid.

VIII

The doctrine which has been developed in the works previously cited has also for its object the elimination of the notion of subjective right, implying at the same time elimination of the autonomy of the individual and of the sovereignty of the State. As Auguste Comte has so clearly shown, the notion of subjective right is a notion of a metaphysical order. "There can only be a true right," said the great thinker "so long as regular powers emanate from supernatural wills. . . . In the positive state, which does not

admit of heavenly prerogative, the idea of right disappears absolutely." [25]

There thus disappears, on the one hand, not only the sovereignty of the State, conceived as the subjective right of commanding, the incumbent of which right would be the State personified, but there also disappears the autonomy of the individual, together with his subjective rights. And, on the other hand, there disappears, by that very fact, the contradiction between the sovereignty of the State and the autonomy of the individual which was created thereby, and which could not be explained.

Here again critics have been many and very lively. But since there are no two jurists or philosophers who can agree on the meaning and nature of subjective right, we find in this profound and general disagreement a most satisfactory answer to those who rise up against the elimination of the notion of subjective right. A very distinguished professor, M. Demogue, after having analyzed and discussed all that has been said about the notion of subjective right and of subject of right, was obliged to conclude in these words: "All that is sometimes puerile, sometimes dangerous; and often it is both at once. . . . We must, therefore, attribute to the expression, *subject of right*, no value except as a convenient term. . . ." [26]

Auguste Comte, moreover, wrote as follows: "Each has duties in relation to all; but no one has any right, properly so called. . . . In other words, no one possesses any other right than that of always doing his duty." [27] Expressing the same idea in a more juridical form, I have said: Neither has the State a subjective right to command, nor have the individuals subjective rights of liberty and of property; but all, governing and governed, are submitted to the jural principle, founded on social interdependence; and by the application of this jural principle all individual wills — the will of those who govern as well as the wills of those who are governed — find themselves placed in a certain situation which we call an objective or legal situation, implying in a general way the obligation upon everyone to co-operate according to his position

[25] Auguste Comte, Système de politique positive, edition published in 1890, I, p. 361. Rapp, Catéchisme positiviste, tenth discourse, Becaut's edition, pp. 299 to 301.

[26] Demogue, Les notions fondamentales de droit privé, 1911, p. 200.

[27] Auguste Comte, Système de politique positive, edition of 1890, I, p. 361.

in the maintenance of social solidarity in either of its two forms, and to do nothing which constitutes an interference with it.

Positive law cannot derive its obligatory force from a supposed commanding power of those who govern. Positive law is imperative when it realizes the jural principle or puts it into practice; it is imperative only when it has one or the other of these two characteristics, which, indeed, are only one, and only in the measure that it has them. Positive law confers subjective rights on no one; neither on those who govern nor those who are governed. It merely creates objective or legal situations for every one, implying legal duties and by the same token implying the power of accomplishing these obligations and of removing obstacles however they may arise, which would prevent the accomplishment of these duties.

In this manner, not only the employment by those in power of the force of constraint which they control but also the power in the governed to demand the employment of such forces of constraint, are legitimatized. But, at the same time, this power of constraint can only legitimately intervene to constrain the refractory for the accomplishment of obligations arising from the jural principle or, if you will, of obligations arising from positive law. Positive law really exists, as such, only when it ascertains a jural principle superior to itself.

Those who govern have power only for the purpose of fulfilling their obligations and only to the extent that they fulfill them. The State is not a power that commands. The State is a differentiated society in which the strongest must employ the force at their disposal to assure the accomplishment of certain services for the benefit of all. Those in power have therefore negative and positive obligations.

First, they have negative obligations. They can do nothing which may impede the free development of individual activity when such activity is in harmony with social interdependence; but individual activity is protected only when it acts in this manner. Individuals have not the right to exercise their free activity as they understand it. If they act contrary to the social solidarity, those in power must intervene to repress such acts. If individuals remain inactive, those who govern have the duty to compel them to act; they also have a duty to prevent them from doing certain

acts that concern only themselves, but are of such a nature as to diminish the social value represented by each individual.

Secondly, those who govern have positive obligations. They must intervene to protect and to guarantee against all obstacles the manifestations of individual activity working to the realization of social solidarity. They must also assure to all individuals the means of freely developing their own activity, because it is an instrument of social solidarity. And so those who govern must intervene to secure to each individual a certain amount of education, the means of subsistence, if such individual cannot procure such means for himself by work, and to assure him work if he can work, in the same way that those who refuse to work or educate themselves can be compelled to do so.

In the doctrine of social solidarity, therefore, we find a complete refutation of the ancient conception of the State; and we can also say a refutation of the German conception. Thus, where we saw and where the Germans still see, a power which has the right of issuing commands, and which can compel by force obedience to its orders, we may now see only a group of men obliged by the social principle (*la règle sociale*) to use their activity and their strength in the service of all.

May I be permitted to conclude this study with the following passage from the introduction of my book, *Les transformations du droit public*, written in 1912: "The principle underlying the whole system of modern public law may be summarized in the following proposition: Those who in fact hold the power do not have a subjective right of public power; but they are under the obligation to employ their power to organize public service, to assure and to control its development. None of their acts are of binding force or of political value, except when they tend toward this end. Public law is no longer a collection of principles to be applied to subjects of rights of different kinds — the one superior, the other subordinate; the one having the right to command, the other the right to obey. All wills are individual wills; all are equivalent in value; there is no hierarchy of wills. All wills are equal if one considers the subject only. Their value can be determined only by the end which they pursue. The will of those who govern has no force as such; it has value and force only to the extent that it makes for the organization and the functioning of

a public service. Thus, the notion of public service comes to replace that of sovereignty. The State is no longer a sovereign power which commands; it is a group of individuals having in their control forces which they must employ to create and to manage public service. The notion of public service becomes, therefore, the fundamental notion of modern public law."

These lines, written before the war, are truer today than ever.